

821
No. 2274

IN THE
United States Circuit Court of Appeals
NINTH CIRCUIT

HEWITT INVESTMENT COMPANY, a corporation,
Appellant,

vs.

MINNESOTA AND OREGON LAND AND TIMBER
COMPANY, a corporation, and E. Z. FERGUSON,
Appellee.

Upon Appeal from the United States District
Court For the District of Oregon.

TRANSCRIPT OF RECORD.

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Court of appeals
822



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vs.

MINNESOTA AND OREGON LAND AND TIMBER
COMPANY, a corporation, and E. Z. FERGUSON,
Appellee.

**Names and Addresses of Attorneys
upon this Appeal:**

For the Appellant:

E. R. York, Fidelity Bldg., Tacoma, Wash.

For the Appellees:

C. W. Fulton, Yeon Bldg., Portland, Ore.

INDEX.

	Page
Amended Complaint.....	1
Answer..	9
Assignments of Error.....	156
Bond on Appeal.....	160
Citation on Appeal.....	163
Complaint, Amended.....	1
Condensed Statement of Evidence.....	45
Decree.....	41
DEPOSITIONS ON BEHALF OF PLAINTIFFS:	
HEWITT, HENRY, Jr.....	126
Cross-examination.....	135
Redirect Examination....	137
Recross-examination....	138
Redirect Examination.....	139
HEWITT, J. J.....	140
Cross-examination.....	142
Redirect Examination....	143
Evidence, Condensed Statement of.....	45
EXHIBITS:	
Exhibit—Letter, Dated January 9, 1906, to Hewitt Investment Co.....	50
Exhibit—Letter, Dated September 25, 1905, E. Z. Ferguson to Hewitt Investment Co.....	130
Plaintiff's Exhibit 1—Letter, Dated December 22, 1905, Henry Hewitt, Jr., to Astoria National Bank.....	47

Index.	Page
EXHIBITS—Continued:	
Plaintiff's Exhibit 2—Letter, Dated January 3, 1906, E. Z. Ferguson to Astoria National Bank.....	48
Plaintiff's Exhibit 3—Letter, Dated January 5, 1906, Hewitt Investment Co. to Astoria National Bank.....	50
Plaintiff's Exhibit 4—Letter, Dated July 24, 1905, E. Z. Ferguson to Hewitt Investment Co.....	56
Plaintiff's Exhibit 5—Letter, Dated January 3, 1906, E. Z. Ferguson to Hewitt Investment Co.....	61
Plaintiff's Exhibit 6—Letter, Dated January 3, 1906, E. Z. Ferguson to Henry Hewitt.....	65
Plaintiff's Exhibit 7—Letter, Dated January 8, 1906, E. Z. Ferguson to Henry Hewitt, Jr.....	68
Plaintiff's Exhibit 10—Letter, Dated January 26, 1906, E. Z. Ferguson to Henry Hewitt.....	92
Plaintiff's Exhibit "A," Attached to Deposition of Henry Hewitt — Letter, Dated January 5, 1906, Henry Hewitt, Jr., to Hewitt Land Co.....	64
Plaintiff's Exhibit "B," Attached to Deposition of Henry Hewitt — Letter, Dated December 22, 1905, Henry Hewitt, Jr., to E. Z. Ferguson.....	63

EXHIBITS—Continued:

Defendant's Exhibit "A"—Postal Card, Dated December 23, 1905, from J. E. Higgins, Cashier.....	82
Defendant's Exhibit "B"—Letter, Dated April 30, 1906, J. E. Higgins, Cashier, to Hewitt Investment Co.....	83
Defendant's Exhibit "C"—Letter, Dated August 17, 1905, E. Z. Ferguson to Hewitt Investment Co.....	76
Defendant's Exhibit "D"—By-laws of Hewitt Investment Co.....	144
Defendant's Exhibit "D-2"—Minutes of Meeting of Stockholders of Hewitt In- vestment Co., November 28, 1890.....	146
Defendant's Exhibit "D-3"—Minutes of Meeting of Board of Trustees, May 29, 1891.....	148
Defendant's Exhibit "D-4"—Minutes of Meeting of Board of Trustees of Hew- itt Investment Co., January 2, 1901....	149
Defendant's Exhibit "D-5"—Minutes of Annual Meeting of Stockholders of Hewitt Investment Co., May 31, 1902..	150
Defendant's Exhibit "D-6"—Minutes of Meeting of Stockholder of Hewitt In- vestment Co., May 30, 1903.....	152
Defendant's Exhibit "E"—Letter, Dated December 22, 1905, E. C. Ferguson to Henry Hewitt, Jr.....	82
Defendant's Exhibit "F"—Letter, Dated	

Index.	Page
EXHIBITS—Continued:	
January 25, 1906, E. Z. Ferguson to Henry Hewitt, Jr.....	84
Motion for Judgment of Nonsuit, etc.....	74
Opinion.....	21
Order Approving Statement of Testimony in Evidence.....	143
Order Directing Certification of Certain Orig- inal Exhibits to U. S. Circuit Court of Appeals....	164
Order Enlarging Time to File Transcript.....	165
Order Granting Petition for Appeal.....	155
Petition for Appeal.....	154
Replication.....	19
Statement of Evidence, Condensed.....	45
Testimony.....	46
Testimony in Rebuttal.....	124
TESTIMONY ON BEHALF OF PLAIN- TIFFS:	
FERGUSON, EDWARD Z.....	54
Cross-examination..	70
Redirect Examination....	73
Recross-examination.....	73
Recalled.....	124
Recalled After Argument.....	125
Cross-examination....	125
HIGGINS, JAMES B.....	46
Cross-examination....	51

TESTIMONY ON BEHALF OF DEFEND-
ANT:

HEWITT, HENRY, Jr.:

Cross-examination..... 87

Redirect Examination..... 120

YORK, E. R..... 122

Cross-examination..... 123

*In the District Court of the United States for the
District of Oregon.*

Be it remembered, That on the 13 day of March 1911,
there was duly filed in the Circuit Court of the
United States for the District of Oregon,, an
Amended Bill of Complaint in words and figures
as follows, to wit:

[Amended Complaint.]

*In the Circuit Court of the United States for the
District of Oregon.*

MINNESOTA AND OREGON LAND AND TIM-
BER COMPANY, a corporation, and E. Z.
FERGUSON,

Plaintiffs,

vs.

HEWITT INVESMENT COMPANY, a corpora-
tion,

Defendant.

Plaintiffs, for their cause of suit against the de-
fendant, by this, their amended complaint, allege:

That the plaintiff, Minnesota and Oregon Land and
Timber Company is and at and during all the times here-
inafter mentioned was a private corporation organ-
ized and existing under the laws of the State of Min-
nesota, and doing business as such in its said corpor-
ate name of Minnesota and Oregon Land and Timber
Company.

That the defendant is and at and during all the
times hereinafter mentioned was a private corpora-
tion organized and existing under the laws of the

State of Washington, and doing business as such in Oregon and elsewhere in its said corporate name of Hewitt Investment Company.

That the following described real estate, to-wit: The Southeast quarter of the Northeast quarter and the Northeast quarter of the Southeast quarter of Section Ten; the Southwest quarter of the Northwest quarter and the Northwest quarter of the Southwest quarter of Section Eleven; the Southeast quarter of Section Seventeen; the East half of the Northwest quarter and the West half of the Northeast quarter of Section Twenty, and the Northeast quarter of Section Thirty, all in Township Six North of Range Six West of the Willamette Meridian, all in Clatsop County, Oregon, is wild timber land situated in said County and State, and is not in the actual or other possession of defendant or any person whatever, but is wholly unoccupied.

That on or about theday of December, 1905, the plaintiffs desired and agreed to purchase said real estate for the use and benefit of the plaintiff corporation and as its property, taking the legal title thereto in the name of the plaintiff Ferguson, who was to hold the same for the use and benefit of the plaintiff corporation, which was to furnish and pay the purchase price therefor; and the defendant, who was at said time the owner of said real estate, being desirous of selling said real estate, an agreement was made by and between plaintiff Ferguson and defendant whereby they agreed, each in consideration of the agreements and undertakings of the other that plaintiff-

iff Ferguson would pay defendant for said real estate the sum of \$12,800.00; that for said price defendant would sell and convey said real estate unto said Ferguson as grantee by a deed of the kind hereinafter mentioned, barring the error therein; that defendant would make and deliver said deed to the Astoria National Bank, a national bank at Astoria, Oregon, duly organized and existing under the laws of the United States, to be held by said bank in escrow and to be delivered by it to plaintiff Ferguson upon his paying said bank said sum of money; and that upon the payment of said sum of money to said bank by plaintiff Ferguson, he would become the owner of said real estate and said deed would be delivered by said bank to him, which said agreement was and is in writing.

That while said deed was to be executed to plaintiff Ferguson as grantee, defendant was informed by plaintiff Ferguson and well knew at the time said agreement was made and at all times thereafter, that plaintiff Ferguson was purchasing said real estate for the plaintiff corporation and with its money.

That thereafter defendant made and executed a deed for said real estate, in which plaintiff Ferguson was duly designated and named as the grantee, and on or about the 22nd day of December, 1905, in conformity to said agreement, delivered the same to the said Astoria National Bank to hold in escrow, and instructed said bank to deliver the said deed to plaintiff Ferguson upon his paying to it for defendant \$12,800.00.

That said deed contained a covenant, wherein and whereby defendant covenanted and agreed that it was the owner in fee of said real estate, that the same was free and clear of incumbrance, and that it and its successors would forever warrant and defend the title thereunto unto said E. Z. Ferguson, his heirs and assigns, against all lawful claims and demands whatsoever.

That while said deed was duly witnessed, acknowledged and attested and was duly signed and executed by defendant in all other respects and particulars, by an inadvertance or mistake the said real estate was mentioned therein as being in Township Six (6) South of Range Six (6) West, instead of Township Six (6) North of Range Six (6) West, although said real estate was mentioned and described in said deed as being in Clatsop County, Oregon, was the only real estate in said County owned by defendant, and the description thereof in all other respects and particulars was accurate and correct.

That the only townships in said County are West of the Willamette Meridian, and North of the Established Base Line of and for United States Governmental surveys within said State, and accordingly are necessarily numbered, designated and known as townships North, being numbered as such with reference to said Base Line.

That on or about the 3d day of January, 1906, the plaintiff Ferguson in accordance with said agreement and the conditions and terms of said escrow duly paid unto the said Astoria National Bank for defendant the said sum of \$12,800.00, the full purchase price for said

real estate; and the said bank accepted the same for said defendant; and plaintiffs thereby duly and fully paid the purchase price for said real estate, duly and fully performed and fulfilled the conditions of said escrow, became entitled to the delivery of the said deed, and as plaintiffs are informed and believe and accordingly allege, as a fact, became the purchasers and owners in fee of said real estate.

That by and according to said agreement and the terms and conditions of said escrow, defendant was to furnish and convey unto plaintiff Ferguson a clear or valid record and marketable title to said real estate. That at or about the time said purchase price for said real estate was paid, plaintiff Ferguson discovered the said defect or error in said deed, and requested defendant to correct the same, and defendant promised and agreed to do so, and requested plaintiff Ferguson to consent to a delivery and entrusting of same deed to one Henry Hewitt, Jr., who is and at and during all the times herein mentioned was, the President and Managing Agent of defendant, for the purpose of having said error therein corrected either by the alteration of said deed itself or the execution of a new deed to be used as a substitute therefor, and returned and delivered to said bank again for plaintiffs.

That relying upon said agreement and representation by defendant, plaintiff Ferguson consented to the delivery and entrusting of said deed to said Henry Hewitt, Jr., from whom and through whom defendant has procured the possession of the same.

That plaintiffs have never nor has either of them ever

agreed or consented to any delivery of said deed by said bank or otherwise to any person or persons other than plaintiffs, except the delivery and entrusting thereof unto said Henry Hewitt, Jr., for the purpose of correcting said error therein, and for no other purpose.

That said purchase was made for the use and benefit of the plaintiff corporation and said purchase price of said real estate was and is furnished and paid by said plaintiff corporation.

That defendant was the owner of said real estate at all times herein mentioned prior to the payment of said purchase price to said bank, and that it has been the owner thereof at all times since said payment and is still the owner thereof unless plaintiffs became the owners thereof upon the payment of said purchase price and their compliance thereby with the terms and conditions of said escrow; but that plaintiffs are informed and believe and accordingly allege as a fact, that they are and ever since the time of the payment of said purchase price to said bank have been the owners of said real estate, the bare legal title thereto being in plaintiff Ferguson, nevertheless the defendant wrongly claims to be the owner thereof.

That said deed was intended by both plaintiffs and defendant to describe said real estate accurately and said error or defect therein was and is wholly unintentional and due to and caused by a mistake, and error by defendant for which neither of plaintiffs is in any way responsible.

That defendant has wholly failed to correct said deed either by the alteration thereof or by the execution of a

new deed to be substituted therefor or otherwise, or to deliver said or any deed either unto said bank to be delivered to plaintiffs or either of them on the payment of said purchase price or otherwise or unto plaintiffs or either of them directly upon the payment of said purchase price or otherwise, and has refused and still refuses so to do, although often requested by plaintiffs so to do.

That plaintiffs are, and at and during all the times herein mentioned were ready and willing to pay over and deliver to defendant said purchase price or sum of \$12,800.00 upon the execution and delivery to said Ferguson of a deed of conveyance conveying to him the said real estate, or correct, as aforesaid, and redeliver to him the deed so withdrawn from escrow as aforesaid; and since the payment of said purchase price unto said bank and prior to the commencement of this suit plaintiffs have at various times notified defendant that they were willing so to do, and have offered so to do, but defendant has at all times refused and still refuses so to do.

That plaintiffs, prior to the commencement of this suit, tendered and offered to pay to defendant said sum of \$12,800.00 if it would either correct the aforesaid error in said deed so withdrawn and redeliver it or would execute and deliver to said Ferguson a deed conveying said lands to him, but defendant refused and still refuses to do either, and plaintiffs accordingly bring said sum of money into Court with their complaint to be paid over and delivered to defendant when by this court plaintiffs or plaintiff Ferguson will have been awarded a decree

vesting in plaintiffs or either of them the title to said real estate.

WHEREFOR, Plaintiffs pray:

1. That if the court shall hold under the facts herein alleged that the title to the real estate hereinbefore described passed to plaintiffs or either of them when said purchase price of said real estate was paid into said bank, then plaintiffs be decreed to be the owners of said real estate, the legal title thereto being in and held by plaintiff Ferguson, and defendant be adjudged and decreed to have no right, title, claim or interest therein, and be forever barred from all claim to any estate or interest in said property.

2. That if, however, the court shall hold that said title did not pass at said time to plaintiffs or either of them than that a decree be entered vesting the legal title in and to said real estate in plaintiff Ferguson and the equitable title thereto in the plaintiff corporation, and ordering, directing and requiring the defendant to execute and deliver to the plaintiff Ferguson a deed or instrument in writing granting, bargaining, selling and conveying to him, his heirs and assigns, forever, free of all liens and encumbrances the said real estate, and that if defendant shall fail so to do within a time fixed by this court, that a commissioner be appointed by this court to make, execute and deliver such deed and that until such deed be executed either by defendant or such commissioner, the decree of this court operate and stand for such conveyance.

3. That plaintiffs have and recover of and from defendant their costs and disbursements in this suit, and

that plaintiffs have such other and further relief as in equity may appear proper and just.

C. W. FULTON,
Attorney for plaintiffs.

[Endorsed]: Amended Bill of Complaint. Filed
March 13-1911.

G. H. MARSH,
clerk.

And afterwards, to wit, on the 29 day of May, 1911,
there was duly filed in said Court, an Answer in
words and figures as follows, to-wit:

[Answer.]

*In the Circuit Court of the United States for the
District of Oregon.*

MINNESOTA AND OREGON LAND AND TIM-
BER COMPANY, a Corporation, and E. Z.
FERGUSON,

Plaintiffs,

vs.

HEWITT INVESTMENT COMPANY, a Corpora-
tion,

Defendant.

The answer of the Hewitt Investment Company, de-
tendant, to the amended bill of complaint.

This defendant, saving and reserving unto itself the
benefit of all exceptions to the errors and imperfections
in said amended bill contained, for answer to so much
thereof as it is advised it is necessary or material for it
to answer unto, does aver and say:

It denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegation that the plaintiff, Minnesota and Oregon Land and Timber Company, is or at any time was a corporation organized or existing under the laws of the state of Minnesota, or was or is doing business in said corporate name.

It admits that it is and was at all times mentioned in said amended bill a private corporation organized and existing under the laws of the State of Washington, and at all said times had and has its principal place of business in the City of Tacoma, State of Washington, and denies that it was doing business as such in the State of Oregon.

It admits that the lands described in the amended bill are wild timber lands situate in Clatsop County, Oregon, and are unoccupied, and avers that all of said lands are now and have been at all times herein mentioned in the possession of this defendant.

It denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations that in December, 1905, plaintiffs desired or agreed to purchase said lands for the use or benefit of said plaintiff corporation or as its property or to take the legal title thereto in the name of the plaintiff Ferguson, or that said Ferguson was to hold the same for the use or benefit of the plaintiff corporation, or that said plaintiff corporation was to furnish or pay the purchase price therefor; and denies that any agreement was made by or between the plaintiff Ferguson and the defendant, whereby they agreed for any consideration that said Ferguson would pay defendant for said lands the sum of \$12,800,

or agreed that for said price defendant would sell or convey said lands to said Ferguson as grantee by any deed, or that the defendant would make or deliver such deed to the Astoria National Bank, of Astoria, Oregon, to be held by said bank in escrow or to be delivered by said bank to plaintiff Ferguson upon his paying said bank said sum of money, or that upon payment of said sum of money to said bank by said plaintiff Ferguson he would become the owner of said lands, or that said deed would be delivered by said bank to said Ferguson, and denies that any such agreement was or is in writing.

It avers that prior to or in the month of December, 1905, plaintiff Ferguson and Henry Hewitt Jr., of Tacoma, Washington, had a personal oral understanding, whereby it was understood between them that the defendant would sell and convey to plaintiff Ferguson the land above referred to and described in said amended bill in consideration of the sum of \$12,800 net in Tacoma funds to be paid by said Ferguson to defendant and in further consideration and upon condition that said Ferguson could and would procure and deliver to defendant, in exchange therefor, at and for an equal price based upon the estimate of timber thereon at fifty cents per thousand stumpage, the title to a quantity of other timber lands, containing an equal estimate, or more of timber, situate in Columbia County, State of Oregon, lying adjoining certain timber lands then owned by defendant in Township 5 North Ranges 3 and 4 West, W. M.; and it denies that said sum of \$12,800, or any part thereof, was ever paid to defendant, or that any of the conditions or considerations for said conveyance were ever

performed or paid by said Ferguson, or any one on his behalf; and avers that said Ferguson has at all times wholly failed and refused to keep or perform the same.

It denies that it was informed by said Ferguson, or by any one, or had any knowledge, at any time prior to the commencement of this suit, that said Ferguson was purchasing, or attempting to purchase, said lands for the plaintiff corporation or with its money.

It admits that on or about December 22, 1905, in conformity with said oral understanding between plaintiff Ferguson and said Henry Hewitt Jr., a deed of conveyance of land to the plaintiff Ferguson as grantee therein was procured by said Henry Hewitt Jr., to be signed in the name of defendant upon representations made by said Henry Hewitt Jr., to defendant that plaintiff Ferguson could and would procure and convey to defendant in exchange therefor those certain other lands above referred to lying adjoining timber lands then owned by defendant in Columbia County, Oregon; and admits that on or about said date said deed was mailed by said Henry Hewitt Jr. to the Astoria National Bank, at Astoria, Oregon, to be held by said bank for delivery to said Ferguson upon payment by said Ferguson to defendant of the sum of \$12,800 net in Tacoma funds and performance by said Ferguson of the terms and conditions of his oral understanding with said Henry Hewitt Jr., as herein averred, as a part of the consideration for said conveyance of the lands described in said deed; it denies that said deed was delivered to said bank to be held by said bank in escrow, or was to be delivered by said bank to plaintiff Ferguson upon his paying to

said bank said sum of \$12,800; it denies that said Ferguson ever paid said sum of \$12,800, or any part thereof, to defendant, and denies that said Ferguson ever paid said sum of money to said bank, if at all, except upon the condition that said money should be held by said bank and paid to defendant only when the title to said lands should be perfected in said Ferguson, and it avers that said bank received and held said money, if at all, as the agent of said Ferguson subject to said condition, and avers that said condition has never been complied with, and said bank has never paid over said money, or any part thereof, to defendant.

It denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations that said deed contained a covenant wherein or whereby defendant covenanted or agreed that it was the owner in fee of the lands therein described, or that said lands were free or clear of encumbrance, or that it or its successors would warrant or defend the title thereto unto said Ferguson or his heirs or assigns, or that said deed was duly witnessed, acknowledged or attested, or was duly signed or executed by defendant; and avers that any such deed signed in the name of defendant was so signed by its officers without any authorization or authority given to or conferred upon said officers to sign, execute, acknowledge or deliver such deed in the name of or on behalf of defendant, and it avers that defendant never received any consideration therefor, and that defendant was not then or at any time the owner of the lands described in or purported to be conveyed by said deed; it denies that it has any knowl-

edge or information as to when or where or by whom said deed was prepared, or what lands were described therein or were intended or purported to be conveyed thereby; or whether the lands described in said deed were erroneously described by inadvertence or mistake.

It denies that it has knowledge or information sufficient to form a belief as to the truth of the allegation that on or about January 3rd, 1906, plaintiff Ferguson paid to said Astoria National Bank for defendant said sum of \$12,800; it denies that any such payment was made in accordance or compliance with any agreement between said Ferguson and this defendant, or with the oral understanding between said Ferguson and said Henry Hewitt Jr.; it denies that said money was received or at any time held by said bank, if at all, except upon certain restrictive terms and conditions precedent required to be performed and complied with before said money, or any part thereof, should or could be paid over by said bank, and denies that this defendant ever agreed or consented to such terms or conditions, or that such terms or conditions have ever been performed or complied with by said Ferguson on his part, or that this defendant has been able to perform or comply with the same on its part; it denies that this defendant has ever received said money, or any part thereof, or that said bank accepted said money for the defendant, or in any manner, if at all, except as agent for the plaintiff Ferguson and upon said restrictive terms and conditions; it denies that plaintiffs, or either of them, have ever paid to defend-

ant any money for said lands, or have performed or fulfilled the terms or conditions of the oral understanding between said Ferguson and said Henry Hewitt Jr. for the sale and exchange thereof; and denies that plaintiffs, or either of them, ever became or are entitled to the delivery of said deed, or any deed of conveyance of said lands, or became or are the purchasers or owners in fee of said lands, or any part thereof.

It denies that by or according to any agreement of defendant, or by the terms or conditions of any escrow, it was to furnish or convey to said Ferguson a clear or valid record or marketable title to said lands.

It admits that the plaintiff Ferguson requested defendant to correct the deed alleged in the amended bill, but it denies that defendant promised or agreed so to do, and denies that it requested plaintiff Ferguson to consent to a delivery or entrusting of said deed to Henry Hewitt Jr. for correction or alteration of said deed, or for the execution of a new deed to be used as a substitute therefor, and returned or delivered to said bank again for plaintiffs or either of them; and denies that relying upon such agreement or representation, or any agreement or representation, by defendant said Ferguson consented to the delivery or entrusting of said deed to said Henry Hewitt Jr. It denies that plaintiffs, or either of them, never agreed or consented to any delivery of said deed by said bank or otherwise to any other person or persons than plaintiffs, and it avers that said deed was on or about the 9th day of January 1906, at the request of

said Ferguson, returned by said bank to this defendant.

It denies that said attempted purchase of said lands was for the use or benefit of plaintiff corporation, and denies that the purchase price of said lands was or is furnished or paid by plaintiff corporation.

It admits that defendant was the owner of the lands described in said amended bill at the time therein alleged, and that it has at all times since been and is now the owner thereof; it denies that plaintiffs, or either of them, became the owners of said lands upon or by payment of the purchase price therefor or by compliance with the terms or conditions of any agreement or escrow made with defendant or said Henry Hewitt Jr.; it denies that plaintiffs, or either of them, are or ever have been the owners of said lands, and denies that any title thereto is in plaintiff Ferguson; and denies that defendant's ownership thereof is wrongfully claimed.

It denies that it has any knowledge or information as to what lands said deed was intended by both plaintiffs and defendant to describe, or whether any error or defect therein was unintentional or due to or caused by mistake, and it denies that the plaintiff corporation had any intention in connection therewith or interest therein to the knowledge of defendant.

It admits that it has not corrected said deed by alteration thereof or execution of a new deed to be substituted therefor, or otherwise, and admits that it has not delivered said deed, or any other deed, to said bank or to plaintiffs or either of them, and has refused

and refuses so to do; and avers that it has failed and refused so to do for the reason that plaintiff Ferguson did not at any time prior to the commencement of this suit pay or tender to defendant the purchase price for said lands and keep or perform the condition of the oral understanding between said Ferguson and said Henry Hewitt Jr., which were the considerations agreed upon by them for the conveyance of the title to said lands, viz: to procure and deliver to defendant in exchange therefor the title to the other timber lands as hereinbefore alleged.

It denies that plaintiffs were at all or at any times prior to the commencement of this suit ready or willing to pay or deliver to defendant the agreed purchase price or the sum of \$12,800 and perform the conditions of said oral understanding between said Ferguson and said Henry Hewitt Jr. which were to be the consideration for the delivery to said Ferguson of a deed of conveyance of said lands; and denies that at any time prior to the commencement of this suit plaintiffs ever notified defendant that they were willing or offered so to do; and denies that plaintiffs prior to the commencement of this suit tendered or offered to pay to defendant said sum of \$12,800 if defendant would correct the alleged error in said deed and deliver it or would execute and deliver a deed to said Ferguson a deed conveying said lands to him.

And defendant avers that neither the agreement alleged in said amended bill of complaint, nor the oral understanding herein averred, nor any agreement, between the plaintiff Ferguson and the defendant,

for the sale and conveyance of the lands described in said amended bill, was made or evidenced by deed or any writing which expressed the consideration thereof, or was subscribed by the parties thereto, or to be charged thereby, or by any person thereunto by said Ferguson or the defendant lawfully authorized; and avers that no money or other consideration was ever paid to or received by defendant for said agreements, or either of them, or for the sale or conveyance of said lands or any part thereof, and the plaintiffs, or either of them, have never entered into or taken possession of said lands, or any part thereof, or expended any money or made any improvements or paid any taxes thereon; and defendant avers that it has since the year 1905 paid all taxes which have been levied and assessed upon the said lands up to the present year, and has paid for such taxes for the year 1905 \$154.05, for the year 1906 \$186.33, for the year 1907 \$183.16, for the year 1908 \$198.80, for the year 1909 \$209.98 and for the year 1910 \$230.70, for the purpose of protecting and keeping clear from tax liens defendant's title to said lands, and fully believing that it was at all said times the owner in fee of the title to said lands.

And having thus fully made answer to said amended bill, defendant prays the decree of the court that the plaintiff, or either of them, have no right, title, interest or claim to or in the lands described in said amended bill and recover nothing in this suit, and that defendant may have and recover its costs against plaintiffs; and if plaintiffs, or either of them, shall be al-

lowed any relief or decree to have any right, title or interest to or in said lands, then defendant prays that it may have such relief as may be just and equitable in the premises.

E. R. YORK

Attorney for Defendant.

HEWITT INVESTMENT COMPANY

By Henry Hewitt Jr.

Its President

[Endorsed] Answer. Filed May 29, 1911.

G. H. MARSH

Clerk

And Afterwards, to wit, on the 1 day of July 1911 there was duly filed in said Court, a replication in words and figures as follows, to wit:

[Replication.]

*In the Circuit Court of the United States for the
District of Oregon.*

MINNESOTA AND OREGON LAND AND TIMBER COMPANY, a corporation, and E. Z. FERGUSON,

Plaintiffs,

vs.

HEWITT INVESTMENT COMPANY, a corporation,

Defendant.

The replication of Minnesota and Oregon Land and Timber Company, a corporation, and E. Z. Ferguson, plaintiffs, to the answer of Hewitt Investment Company, a corporation, defendant:—

These repliants saving and reserving unto themselves now and at all times hereinafter, all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto, say, that they will aver, maintain, and prove, their said Bill of Complaint to be true, certain, and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by these repliants. Without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law, to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true. All which matters and things these repliants are and will be ready to aver, maintain, and prove, as this honorable court shall direct, and humbly pray as in their said bill they have already prayed.

C. W. FULTON

Solicitor for Plaintiffs.

[Endorsed] Replication Filed Jul 1, 1911

G. H. MARSH

Clerk

And afterwards, to wit, on the 3 day of February 1912 there was duly filed in said Court, an opinion in words and figures as follows, to wit:

[Opinion.]

*In the Circuit Court of the United States for the
District of Oregon.*

No. 3125.

MINNESOTA and OREGON LAND AND TIMBER
COMPANY, (A corporation) and E. Z. FUR-
GUSON,

Plaintiffs,

v.

HEWITT INVESTMENT COMPANY (a corpora-
tion)

Defendant.

C. W. FULTON for Plaintiffs,

E. R. YORK for Defendant.

This is a suit to compel the specific performance of an alleged contract or agreement for the sale and conveyance of certain real property by the defendant, the Hewitt Investment Company, to the plaintiff Minnesota and Oregon Land and Timber Company. The plaintiff E. Z. Ferguson was the agent of the Land and Timber Company, and was authorized to contract for and to purchase timber lands for said company in his name. About December 22, 1905, the defendant Investment Company executed to Ferguson a deed to 640 acres of timber-land situated in Clatsop County, Oregon. On that date Henry Hewitt, Jr., who was the president of the Investment Company, transmitted the deed from Tacoma, Washington, to the Astoria National Bank in Astoria, Oregon, with directions to the bank to deliver the deed to Ferguson for \$12,800 net to the grantor in Tacoma funds. The letter and deed were received by the bank on the following day. The \$12,800 was paid into the bank by Ferguson on January 3, 1906, with instructions to deliver the same, when the title to the land should be made perfect in him, Ferguson, to the Invest-

ment Company in Tacoma Exchange, and that, pending the perfecting of said title, the bank should hold the money and deed in its possession. Ferguson at the time specified certain defects in the title which needed correction. On January 5th the Investment Company requested of the bank a return of the deed. The deed was returned on January 9th for correction. Thereafter the Investment Company kept the deed, and finally refused to make any correction, or to return the same to the bank, or to deliver it to Ferguson.

The plaintiffs allege, in effect, that the deed was deposited with the bank in escrow, so understood and treated by all the parties, and that it, together with the arrangement whereby it was so placed in escrow, and the letters passing between the parties attending the transaction, constituted a valid and binding contract, whereby the defendant agreed to sell and the plaintiffs to purchase the lands described in the deed at and for the consideration of \$12,800, and that plaintiffs are entitled 'to have the same specifically enforced.

The defendant controverts the claim of plaintiffs, and avers that Ferguson and Henry Hewitt, Jr., had a personal understanding, but not in writing, whereby it was agreed between them that defendant should sell and convey to the plaintiff Ferguson the lands described in the deed for the consideration of the sum of \$12,800 in Tacoma funds to be paid by Ferguson to defendant, and in further consideration that Ferguson could and would procure and deliver to defendant in exchange therefor, at and for an equal price, based upon the estimate of timber thereon at 50 cents per thousand feet of stump,

age, the title to a quantity of other timber-lands containing an equal estimate or more of timber situated in Columbia County, Oregon, lying adjoining certain timber-lands then owned by defendant. These averments are denied.

Wolverton, District Judge:

That the parties—Henry Hewitt, Jr., acting on the one part and E. Z. Ferguson on the other—had an understanding that the defendant company should deed the lands in dispute to Ferguson for a consideration of \$12,800 there is no dispute. But there is a dispute as to whether Ferguson, as further part consideration for the sale to him, agreed to secure other lands for the defendant company adjoining some that it held in Columbia County. It is also disputed that the deed was delivered to the bank in escrow, and it is affirmed that whatever negotiations might have taken place relative to the sale of such lands by defendant company to Ferguson were not in writing, and therefor not binding or obligatory upon the defendant. There is a controversy also whether the negotiations were had with the defendant company or with Henry Hewitt, Jr., individually and upon his own account, and whether the company or its officers were authorized to execute the deed in question.

The negotiations were attended with considerable correspondence, and it will aid us materially first to take note of that. On July 24, 1905, Ferguson wrote the Hewitt Investment Company:

“You will remember that I have corresponded with you and also had a personal interview with your Mr. Hewitt some time since, in regard to the four claims

that you own in 6-6, but at that time the price that you were asking for this land, was more than our parties would pay. I notice from the plat in my office that you are the owner of quite a little bunch of land in 5-3 and 5-4, Columbia Co., and I would like to know if you would consider a proposition to trade your 4 claims in 6-6 for four claims adjoining the land that you own in Columbia Co., providing of course, that the land was as well timbered with as good a quality of timber. Our information on this subject shows the timber to be about the same in both localities."

Hewitt answered at the foot of the letter, and returned it:

"Your's received on my return. I hardly care to trade lands. I might sell the whole bunch at 20.00 per acre. It is heavily timbered, will average from 6 to 9 M per claim. One claim somewhat burnt."

Again on August 17 Ferguson wrote inquiring whether the Investment Company would consider a proposition for an exchange of lands, and on September 25th as follows:

"Your letter of recent date stating that you would not care to trade your lands but that you would sell them all for twenty dollars per acre, received, but in reply I have to say that there seems to be a very poor prospect of making a sale of this tract at the present time. Timber buying has dropped off, and there is practically no timber changing hands. It may be better after awhile. I am authorized to offer you eight thousand dollars for the four hundred acres in 6-6. As you know one of these claims is partially burned. One of them is better

than the average, and the other two are just about up to the average, in that part of the country, and the price offered you is more than has been paid any one else in the township. The timber is mostly red and bastard fir; practically no yellow fir."

On December 22, 1905, Hewitt wrote the Astoria National Bank:

"Please deliver the enclosed deed of lands in 6-6 West to E. Z. Ferguson for \$12,800. net to us in Tacoma funds. We have notified Mr. Ferguson and he will probably call for the deed at an early date."

He also wrote Ferguson as follows:

"We have today sent deed for lands to Astoria N. Bk. which they will deliver to you on payment of \$12,800.00

"I will send you a check for commissions when money is received of 2 1-2 per cent. Our directors would not allow more & in fact did not like to deed the land at all. We consider this land worth \$30,000. However if you can find us the land you promised, will send my son or another good cruiser to look over lands & in some way make good my promise to you. Now hustle & find the other land. It must be comeatable & good logging chance finally."

By a coincidence Ferguson wrote Hewitt on the same day:

"I have just completed the abstracts for your land, but have not yet given them to the attorney. I have however looked them over myself and find one matter that needs attention. There are four deeds to the Hewitt Investment Co. and each is signed Lester B. Lockwood, Hattie M. Lockwood by Herbert S. Griggs her attorney

in fact, and we do not find any power of attorney of record from Hattie M. Lockwood. It will be necessary to have this or else a deed from Hattie M. Lockwood. Please inform me if you have the P of A, and if so send it with your deed to the Bank; if not, can you get a deed from her? If the attorney finds anything else will let you know, but I do not think there is anything else. Of course you are aware that in Oregon the wife has a dower and her signature is more important than in Washington.

"Up to this time I have been too busy to send you the map of the other lands, but will do so soon. There is quite a little work to make it up.

"When can I expect the deed?"

On December 23rd J. E. Higgins for the bank acknowledged receipt of Hewitt's letter with inclosure.

On January 3, 1906, Ferguson wrote the bank:

"Relating to the deed from the Hewitt Investment Co. to E. Z. Ferguson, the undersigned, said deed being in your possession to be delivered to me upon the payment of \$12,800 and purporting to convey the following described land, to-wit: (Description of land), I have to say that the following matters in connection with the title to said land need to be corrected. In the said deed the description reads T. 6 S., whereas it should read T. 6 N., also there is lacking in the title to said land a power of attorney from Hattie M. Lockwood to Herbert S. Griggs, which said power of attorney should be furnished by the Hewitt Investment Co. and placed of record. It also appears that the Hewitt Investment Co. has not complied with the Oregon laws governing foreign cor-

porations. I therefor deposit with you herewith the sum of \$12,800.00 in gold coin of the United States, made payable to the said Hewitt Investment Co. with instructions that you shall, when the title to the said land shall have been made perfect in me, deliver to the said Hewitt Invest. Co. the said \$12,800 in Tacoma Exchange, and that pending the making of said title perfect in me. you shall hold this money and deed in your possession."

On the same day Ferguson wrote Hewitt Investment Company:

"On Dec. 26th I wrote you in regard to the title of your land which I am purchasing, stating that there was lacking in the title, a power of attorney from Harriet M. Lockwood to Herbert S. Griggs, but up to this time, have no reply. My attorney has examined the abstract in regard to this title, but in addition to the power of attorney which is lacking, he finds two other matters which need attention.

"In the deed, which you sent here, the description reads T. 6 S. instead of T. 6 N., also it does not appear that the Hewitt Investment Company has complied with the Oregon laws governing foreign corporations. I think for your own protection, that you would wish to straighten up this last matter on account of your other land in Oregon.

"I do not know how seriously this affects the title, but think it would be better if it was straightened up. I have today deposited in the Astoria National Bank, the sum of \$12800, the sum to be sent you in Tacoma Exchange when the title to this land is made perfect in me. I do this so that you will understand that I am not en-

deavoring to gain time, but am ready and willing to take over the deal whenever it is in shape for delivery."

He also wrote Henry Hewitt, Jr., as follows:

"This morning I wrote to the Hewitt Investment Co., which letter you will undoubtedly receive about the same time that you receive this, and at noon today I received your letter of the 2nd, to which I hasten to reply. I think, in order to get this matter straightened up with the greatest possible speed, it would be best for you to prepare a new deed, making it just the same as the former deed, excepting to state that the land is all in T. 6 N. R. 6 W., W. M., instead of T. 6 S. as it now reads.

"It is evident from the deed in the bank that you have a copy and can see how this mistake occurred. This deed you can send to the bank to be substituted for the one that is now in their hands.

"If at the same time, you have an original power of attorney to Mr. Griggs from Harriet M. Lockwood, it could be sent over and recorded in this county; if you haven't the original, you can have a certified copy made from the records there which will answer the same purpose, but before doing this, I would suggest that you examine the power of attorney carefully and see if it conveys sufficient power to enable Mr. Griggs as her attorney to convey land in Oregon, otherwise, it would be of no use and it would be necessary to obtain a deed direct from Mrs. Lockwood. Under the Oregon laws, the wife's interest is absolutely necessary to have. We are very particular in regard to our titles, because we expect to sell this land some day

and do not wish to have any trouble when the time comes.

"In regard to the Hewitt Investment Company's having failed to comply with the Oregon laws governing foreign corporations, we will not let this delay the deal, but will take it for granted that you will straighten it up at your leisure, but would like to know, when you write me, the exact amount of the Company's incorporated capital."

On January 5th the Hewitt Investment Company wrote the bank requesting a return of the deed, as follows:

"The Hewitt Investment Co. or Henry Hewitt, Jr. sent you some time ago deeds to deliver to E. Z. Ferguson on payment of 12800 I think. The deeds it seems are faulty & Mr. Ferguson wants them changed. You will please return them & oblige."

On the same day Hewitt wrote Ferguson:

"Your favor Jan. 3 received. I have written Astoria Nt. Bank to return deeds & as you suggest will make out new deeds. Mr. Griggs has the old Hattie Lockwood deeds signed by him as power of attorney & will send new deed for her to sign. It may take some little time.

"About the commission, the Co. some time ago passed resolutions to only allow 2½ commissions for sales of lands, of which I was not informed, & besides this when I brought the matter up the directors all but myself were against selling & would not have consented at all only to accomodate me. I should have brought the matter up. Of course you

know what any officer promises is only good for his best endeavors to carry out his promise. You are mightly lucky to get the land at all.

"Advise bank to return deeds."

On January 8th Ferguson wrote Hewitt:

"Replying to your favor of the 5th, I have to say that the bank has informed me that they would return the deeds to you by tonight's mail.

"I suppose it will take two or three weeks for you to get them straightened out. In any event, the money will be left at the bank for you as soon as the title is completed.

"Some time this week, I will send you a plat of Columbia County, showing your lands there, as well as the surrounding timber, and statement of what I believe would be possible in adding to your holdings in that locality."

And on January 25th Ferguson again wrote Hewitt:

"If it can be arranged satisfactory to all of us, I would rather pay the money over to you. In case we would pay the \$12800 to the Hewitt Investment Company and take its Warranty Deed to the land, would you and the company be willing to give me an agreement and assurance that you would perfect the title, say within a year, or longer, if need be?

"I see no reason why we cannot fix this up without difficulty: the Power of Attorney may turn up, or in any event, Mrs. Strong will get through her honeymoon some time and come home. Do you know when she procured her divorce? It may be that this

would straighten the matter; in any event, it seems to me that if you get the money and we know the title to the land is going to be perfected, that is all that is necessary and we can all sleep the sleep of the just.

“At your rate of interest, the money in the bank is losing nearly \$100 a month and I hope we can get it into your hands with the greatest possible speed and would therefor request an early reply.”

This comprises practically the whole correspondence found in the record bearing upon the dealings of the parties respecting the land in controversy. Somewhat is said touching the amount of the commission Ferguson was to get for making sale of the land. This is not now a matter of dispute. And much is said respecting other lands looking to some further negotiations, but it does not elucidate the transactions of the parties with reference to the particular land here in controversy.

As will be noted from the correspondence, Ferguson made inquiry of the Hewitt Investment Company looking towards the exchange of certain lands in Columbia County for those in dispute, designated as the claim in 6-6. The exchange of lands was declined, but Hewitt indicated that he might sell “the whole bunch” for \$20. per acre, saying the land was heavily timbered and would average from six to nine million feet per acre. Then by Ferguson’s letter of September 25th, 1905, he offered \$8000. for the “four hundred acres in 6-6.” Nothing seems to have come of this offer. The parties talked with each other on occasion,

and finally it was agreed between them, but not by specific note or memorandum in writing, that the defendant company would sell and Ferguson would purchase the 640 acres of land in controversy. Looking to a consummation of the agreement, the defendant sent its deed purporting to be executed and acknowledged in favor of Ferguson to the Astoria National Bank to be delivered to Ferguson on his payment into the bank for the defendant of the sum of \$12,800. To this point the contestants are agreed, except that the defendant claims that Ferguson agreed, as part of the same transaction, that he would procure for defendant other lands in Columbia County containing an equal estimate or more of timber, at a price equivalent to 50 cents per thousand feet in the stump. Ferguson denies that any agreement was reached between them touching these other lands. There was much conversation between them, and much was said in the correspondence respecting other lands situated in Columbia County, and lands adjoining lands belonging to the defendant in such county, whereby it appears that Ferguson was endeavoring to find for the defendant lands which the latter desired to purchase if the timber was suitable and the price satisfactory. But the strong preponderance of the evidence is against the conclusion of any definite agreement, either oral or written, as claimed by defendant. It is enough, it seems to me, to set this matter at rest that the parties agreed that the \$12,800 consideration for the lands in dispute was to be paid through the bank directly to the defendant company.

No part of this money was to be used by Ferguson for the purchase of other lands, and there was to be no direct exchange of the lands in question for those other lands spoken of. Had it not been for the irregularities found in the title the agreement touching the lands in dispute would have been fully closed and executed by the final passing of the deed through the bank and the payment of the consideration therefor. It is unlikely that the parties would be willing thus to close up the matter in that respect if the dealings as to the other lands were of such importance as is claimed for them. The defendant desired to, no doubt, and would have purchased other lands, as a further investment and Ferguson busied himself to a greater or less extent in endeavoring to find such lands. When found, the timber thereon was to be subject to the cruise of the defendant, and the price depended upon what they could have been purchased for in the market, so I conclude on this subject that, while the parties canvassed the matter respecting the purchase by defendant through Ferguson of other lands, there was no definite agreement arrived at as to this, nor did any agreement of the kind form or constitute a part of the agreement to sell and convey the lands in dispute.

The essential controversy hinges about the contract to convey. The defendant insists that it was verbal only, and, being concerning land, was a nullity; while, on the other hand, it is contended that, considering the correspondence between the parties, together with the deed and the manner of its treatment and disposal, the contract was in writing, or of such a character as to preclude

the application of the statute of frauds. This includes the suggestion that the deed was by agreement of the parties placed with the bank in escrow, to be held by it subject to the payment by Ferguson of the consideration to be accounted for to the defendant.

The Hewitt Investment Company denies that there was any understanding or agreement that such deed should go to the bank in escrow, and claims that the deed was only sent to the bank as the agent of the defendant to carry out its instructions respecting the same.

Ferguson testifies that on a particular trip he made to Tacoma, where Hewitt lived, he and Hewitt, who was acting for the defendant company, agreed upon a deal whereby the defendant would sell the four claims to plaintiff for the consideration of \$20. per acre, or the aggregate sum of \$12,800, and that Hewitt "would send the deed over to the Astoria National Bank." "He," continued the witness, "told me that he would have the deed executed, and would send it over, and I was to go home, which I did, and pay the money." At the close of his examination he further testifies respecting the same subject:

"Q. Mr. Ferguson, I wish you would explain to the court how it happened that the deed was sent over to the Astoria National Bank by Mr. Hewitt A. Why, I think I requested him to send it to the Astoria National Bank.

Q. What did he say in regard to doing that? A. Why he said that he would have it fixed up; said he would have to have a meeting of the board of directors, and that he would fix it up; and that is when I asked him

about the board of directors, and he told me that he was practically the whole thing; that he and his son owned all the stock. Q. So you suggested to him to send it to the Astoria National Bank, and what were you to do when he sent it to the Astoria National Bank? A. Why of course, I told him the abstracts would have to be made, and if we found the title was all right, we would pay the money. That was the general understanding with things of that kind. (Cross examination): A. Mr. Ferguson, that was just a matter of detail between you and Mr. Hewitt?. A. Yes, Q. But that was not any special matter of agreement at all, was it? A. Well, I suppose it would be just as much an agreement as all our talk was at that time. Q. But did you have any special agreement as to the conditions under which the deed was to be sent to the bank? A. Nothing. I don't think anything special. Q. Or any as to the conditions under which the money was to be paid into the bank by you? A. Well, of course, I don't know—Q. I mean, was there any special agreement at that time on the subject? A. I don't know as there was any special agreement. I don't remember just what was said between us on that subject at that time. Q. Mr. Hewitt was to go ahead and have the deed executed, and send it down? A. Send it over, and we would have an abstract of title made, and when the title was perfected we would pay the money and take the deed. That would be the usual method of procedure. Q. (Redirect) That was the custom, was it? A. Yes."

A deed in escrow is one that has been delivered to a stranger, with directions that he shall deliver to the

grantee upon performance by the latter of some condition, as the payment of a sum of money, or the observance of some obligation, or the happening of some event, the grantor reserving the right to reclaim the deed if the condition is not fulfilled or the event does not happen. *Wier v. Ratdorf*, 38 N. W. (Neb.) 22, 23; 16 Cyc. 561. And it would seem that it is not essential that the condition upon which the instrument is delivered in escrow be evidenced by writing. It may rest in parol, or it may be partly oral and partly in writing, and may be established by oral testimony. 11 Am. & Eng. Enc. of Law (2 Ed.) 343; *Gaston v. City of Portland*, 16 Or. 255; *Cannon v. Handley*, 13 Pac. (California) 315.

But it is not essential here to inquire strictly as to these matters. I have concluded that what was done and what was written relative to the transaction, including the deed that was sent to the bank, constituted a valid contract in writing for the sale of these lands by the defendant to plaintiff Ferguson. The earlier correspondence shows that Ferguson was desirous of making an exchange of lands. All proffers on this basis were declined by the defendant. After some further correspondence and negotiation, the parties agreed verbally upon the sale of four claims at the price of \$20 per acre, or \$12,800. The deed was executed. It contained a description of the land to be sold, and expressed the consideration, and was in apt form of conveyance by a corporation. Standing alone without delivery, unless deposited as a perfect escrow, it would not be sufficient as a contract to convey, and specific performance could not be predicated upon it. But there is more here, and the parties have practically confirmed in writing what

they agreed to orally. On the same day the deed was sent to the bank, Hewitt, who was acting for defendant, wrote Ferguson "We have today sent deed for lands to Astoria National Bank, which they will deliver to you on payment of \$12,800." It would seem from the letter written by Ferguson to Hewitt on the same day, without knowledge that Hewitt had written, that Ferguson had previously had in his possession the abstract of title to the land, for he points out an irregularity in such title. He requests of Hewitt furthermore, if he has in his possession a certain power of attorney, the instrument upon which the irregularity depends, that he send it along with the deed to the bank. On January 3, 1906, Ferguson wrote again to the Hewitt Investment Company stating that his attorney had examined the title and had found two other matters which needed attention. One was that the description of the deed designated the land as in Township 6 South instead of 6 North, as it should be, and the other that the Investment Company had not complied with the Oregon laws governing foreign corporations. It should be said in this connection that the deed described the lands as lying in Clatsop County, Oregon, which cured the defect to which attention was called as to description. The letter also stated that Ferguson had, on that day, deposited in the bank \$12,800 to be sent to the defendant when the title was made perfect. On the same day, January 3rd, Ferguson also wrote to Hewitt suggesting that, in order to get the matter straightened up speedily, it would be best for Hewitt to prepare a new deed making it just the same as the former deed, the one in the bank, excepting to state that

the land was in Township 6 North instead of Township 6 South, "as it now reads," and further suggesting, "This deed you can send to the bank to be substituted for the one that is now in their hands." Other suggestions were made relative to the power of attorney, and Ferguson advised Hewitt that he would not let the non-compliance on the part of the company with the Oregon laws "delay the deal." On January 5th the Hewitt Investment Company requested the bank to return the deed. On the same day Hewitt wrote Ferguson that he had written the bank for the return of the deed, and that, as suggested by Ferguson, he would make out a new deed. He also requested Ferguson to advise the bank to return the deed. Ferguson had previously, to-wit, on January 3rd, deposited the \$12,800 with the bank, and written it to deliver the said sum in Tacoma Exchange to the Hewitt Investment Company when the title to the land had been made perfect in him, Ferguson, and that, pending the making of said title perfect, it should hold the money and deed in its possession. On January 8th Ferguson wrote Hewitt that he had been informed by the bank that it would return the deeds, and further stated: "I suppose it will take two or three weeks for you to get them straightened out. In any event, the money will be left at the bank for you as soon as the title is completed."

Now, taking this correspondence together, including the deed and the treatment thereof by the parties, I am of the opinion that it constitutes an agreement in writing in effect such as is required by the statute of frauds respecting sales of land. The deed, while deposited with the bank, was not withdrawn except by the consent of

Ferguson, and when withdrawn it was understood that another would be substituted in its stead, with the corrected description, when the title could be straightened out. The deed, treated as a memorandum, expressed the consideration, described the property to be conveyed, and was subscribed by the party to be charged. This was to be replaced by a new deed with an amendment in the description—an amendment not altogether material to a valid conveyance of the land. The correspondence, aside from the deed, comes near if not quite fulfilling the like requirements of a contract for the sale of lands. But the deed, under the agreement by which it was withdrawn from the bank, must be considered as subsisting, even though in the hands of the Investment Company, until a new deed is produced to take its place. It was not cancelled nor ultimately surrendered. It was allowed to be returned until a new one should be produced to take its place, the money remaining ready at all times to be paid over when the arrangement was consummated. Without else, the contract is valid, and one that a court of equity would require to be specifically performed. In support of this view see *Flegel v. Dowling*, 54 Or. 40; *Alexander v. Vandercook*, 39 N. W. (Mich.) 858; *Regan v. Howe*, 121 Mass. 424.

The irregularity as to compliance with the Oregon laws by the Hewitt Investment Company was waived by the letter which has been noted. As to the power of attorney, Ferguson testifies that he remembers finding one in the records at Tacoma, and that he told Hewitt he would be satisfied with a certified transcript of it, as far as the title was concerned, and requested the deed of

him, but that he has not delivered it nor surrendered the corrected deed. It seems, therefore, that Ferguson did not further insist upon the title being corrected as first requested, and was willing to take the title as it was under the warranty of title, thus relieving the transaction of the objections first made as to the title. No further obstacle remaining, the Hewitt Investment Company should have redelivered the old deed or executed and delivered a new deed to take its place.

I am not favorably impressed with the defense as elucidated by the testimony, that the Investment Company was not authorized to execute the deed. Henry Hewitt, Jr., was in control of the entire business of the company, and he and his son J. J. Hewitt, and perhaps his wife, were the owners of practically the whole of the capital stock. J. J. Hewitt, the son, was secretary. The by-laws of the company would seem to authorize the president, with the approval of the other members of the finance committee—such committee consisting of the president and two other members of the board of directors—to buy and sell real property without further specific authority from the board. By Article 7 he is made general manager, “with full power to buy real estate—or anything which the company is entitled to hold, buy and sell, subject to the approval of the finance committee;” and by Article 11, it is made the duty of the finance committee “to advise with and approve the purchases and sales made by the president.” Evidently Henry Hewitt, Jr., has conducted the business of the company as though he were vested with full power to do the things requisite to the purchase and sale of real property, all in the name of the company, and his conduct in

connection with the transaction now in controversy was in accord with such practice. Under such conditions and practice, the Hewitt Investment Company ought to be and is estopped to deny the authority of Hewitt to enter into the contract or agreement in question to execute with the secretary the deed necessary to convey the title. The plaintiffs are therefore entitled to a decree requiring the defendant Hewitt Investment Company to execute and deliver to Ferguson a deed in form as executed and placed in the bank to the premises in question. The defendant, however, is entitled to the fund deposited in the bank as consideration for the land, and, having paid the taxes on the land since the deed was first executed, should have a decree for the repayment to it by plaintiffs of such taxes, with interest at the rate of six per cent per annum from the time of payment, amounting in the aggregate to \$1716.

[Endorsed]: Opinion. Filed Jan. 6, 1913.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 3 day of February, 1913, there was duly filed in said Court, a Decree in words and figures as follows, to-wit:

[Decree.]

MINNESOTA AND OREGON LAND AND TIMBER COMPANY, a Corporation, and E. Z. FERGUSON,

Plaintiffs,

vs.

HEWITT INVESTMENT COMPANY,

Defendant.

This cause having come regularly on for trial, the plaintiffs appearing by Mr. C. W. Fulton, their attorney and the defendant appearing by Mr. E. R. York, its attorney, and the court having heard the evidence and the cause having been argued by counsel and due deliberation had thereon,

It is Ordered, Adjudged and Decreed, and the Court by virtue of the power and authority therein vested doth order, adjudge and decree that the defendant execute and deliver to the plaintiff, Minnesota and Oregon Land and Timber Company, a corporation organized and existing under and pursuant to the laws of the State of Minnesota, a good and sufficient deed whereby the said defendant shall grant, bargain, sell and convey to the said Minnesota and Oregon Land and Timber Company, its successors and assigns, the Southeast quarter of the Northeast quarter and the Northeast quarter of the Southeast quarter of Section 10; the Southwest quarter of the Northwest quarter and the Northwest quarter of the Southwest quarter of Section 11; the Southeast quarter of Section 17; the East half of the Northwest quarter and the West half of the Northeast quarter of Section 20 and the Northeast quarter of Section 30, all in Township 6 North of Range 6 West of the Willamette Meridian in Clatsop County, State of Oregon, which deed shall contain covenants whereby the grantor shall covenant to and with the grantee, its successors and assigns, that the grantor is seized in fee simple of the said premises and that the same are free from incumbrances and that the grantor will warrant and defend the title thereto against the lawful claims and de-

mands of all persons whomsoever.

It is further ordered, adjudged and decreed that if the defendant shall fail to execute and deposit with the clerk of this court to be delivered to said Minnesota and Oregon Land and Timber Company a deed as aforesaid, within twenty days from this date, then A. M. Cannon be and he is hereby appointed a commissioner of this court to make, execute and deliver such deed to the said Minnesota and Oregon Land and Timber Company in the name of and as the act and deed of the defendant.

And it appearing to the court that on the institution of this suit in the Circuit Court of the State of Oregon for Clatsop County, that being the court in which this cause was commenced, there was deposited with the clerk of said Circuit Court for Clatsop County, the sum of \$12,800.00 to be paid to the said defendant upon the execution of such deed as is hereby decreed to be executed and that by agreement between the parties hereto said sum of \$12,800. was deposited in the Astoria National Bank of Astoria, Oregon, and is still on deposit in said bank and certain interest has accrued thereon,

It is Further Ordered, Adjudged and Decreed by the court that upon the execution and delivery of said deed in this court for the Minnesota and Oregon Land and Timber Company, the sum of \$12,800.00 together with such interest as has accrued thereon shall be paid over and delivered to the defendant.

The Court further finds that the defendant has paid taxes on the aforesaid premises subsequent to its contract to convey the same to the said plaintiff, in the sum of \$1760. and that the defendant is entitled to and

it is hereby decreed to have a lien upon the premises aforesaid to secure to it the payment of said sum of \$1760.00 less the plaintiff's costs and disbursements taxed herein.

IT IS FURTHER ORDERED AND DECREED by the court that within five days after the deed aforesaid shall be executed and delivered to the clerk of this court for the said Minnesota and Oregon Land and Timber Company, it, the said Minnesota and Oregon Land and Timber Company shall pay to the clerk of this court for the defendant or file with the clerk of this court the receipt of the said defendant for said sum of \$1760.00 less plaintiffs costs and disbursements in this suit herein taxed, or the receipt of its said counsel in this cause for said sum and thereupon the said deed shall be delivered to the said Minnesota and Oregon Land and Timber Company.

IT IS FURTHER ORDERED AND DECREED by the Court that the plaintiffs have and recover of and from the defendant herein their costs and disbursements in this suit, taxed at \$108.65.

R. S. BEAN

Judge.

[Endorsed]: Decree Filed Feb. 3, 1913.

A. M. CANNON,

Clerk U. S. Dist. Court.

And afterwards, to wit, on the 28 day of March, 1913, there was duly filed in said court, a condensed statement of evidence in words and figures as follows, to wit:

[**Condensed Statement of Evidence.**]

*In the District Court of the United States for the
the District of Oregon.*

MINNESOTA AND OREGON LAND AND TIM-
BER COMPANY and E. Z. FERGUSON,
Plaintiffs,

vs.

HEWITT INVESTMENT COMPANY,
Defendant.

Upon the trial of the case held at Portland, Oregon, on June 3d and 4th, 1912, before Honorable Charles E. Wolverton, District Judge, testimony and other evidence was introduced on behalf of plaintiffs and defendant, and other proceedings were had as follows, to-wit:

The plaintiffs offered in evidence the deposition of Henry Hewitt, Jr., taken pursuant to stipulation, and filed herein.

The defendant objected to the testimony contained in the deposition on the grounds that it is incompetent for the purposes of establishing a valid contract of purchase under the statute of frauds, and as an attempt by this evidence to establish an agreement of sale of land by parol it is incompetent for such purpose.

The Court: I think you can let it be understood that the objections are raised and that the court, without passing upon the objection, takes it under consideration to be determined at the time of the final adjudication. Then each party can file a brief

stating your objections and arguments thereon. The objections may be considered submitted to the court and the court reserves its judgment until the final decision in the case.

The Court: It will be understood on this trial that all rulings are deemed excepted to by the party against whom the ruling is made.

JAMES E. HIGGINS, a witness called on behalf of plaintiffs, testified as follows:

Direct Examination.

I reside in Astoria, Oregon; am cashier of the Astoria National Bank; have occupied that position 20 years or more; was such official and occupied that position in 1905 and 1906. I recall the circumstances of a deed being sent to the bank by the Hewitt Investment Company in December, 1905, for E. Z. Ferguson. This is the letter that accompanied the deed received at the bank on December 23, 1905.

Letter produced, offered in evidence by plaintiffs.

Defendant admits the signature of Henry Hewitt Jr. to the letter, but objects to the letter as incompetent, irrelevant and immaterial as evidence in this cause, and that the letter is not shown to be the letter of the defendant corporation, or written in its name, or signed by any person as an officer of such corporation, but is a personal letter of Henry Hewitt Jr.

The Court: It may be introduced and you can raise that objection hereafter, and its relevancy considered later.

Letter marked "Plaintiff's Exhibit 1," and read in evidence as follows:

"Astoria National Bank,
Astoria, Ore.

Please deliver the enclosed deed of lands in 6-6 West to E. Z. Ferguson for \$12,800.00 net to us in Tacoma funds. We have notified Mr. Ferguson and he will propably call for the deed at an early date.

Yours truly,

12-22-1905.

HENRY HEWITT, JR."

I received the deed referred to in that letter at the time, in the letter. Mr. Ferguson requested the deed with a draft covering the amount, \$12,800.00, to be sent to Portland for payment. The money was paid in on the 27 day of December, \$12,800.00. I recognize the signature to the letter now handed us, signed by E. Z. Ferguson, dated January 3, 1906, addressed to Astoria National Bank; I received that letter on January 3, 1906, and acknowledged receipt of it on same day. I am acquainted with Mr. Ferguson's hand writing and that is his signature. The letter came from him to me. The signature appended to the letter is my signature.

Plaintiffs offered letter in evidence.

Defendant objects to the letter as being incompetent, irrelevant and immaterial as evidence of any matter in issue in this cause and as not establishing a valid contract for the sale of the land.

The Court: The letter will be admitted, with the reservation of the court's final determination as to

its competence when the case is submitted.

Marked "Plaintiff's Exhibit 2," and read in evidence as follows:

"Astoria, Oregon., Jan. 3, 1906.

Astoria National Bank,

Astoria, Oregon.

Gentlemen:

Relating to the deed from the Hewitt Investment Co. to E. Z. Ferguson, the undersigned, said deed being in your possession to be delivered to me upon the payment of \$12,800 and purporting to convey the following described land, to-wit: The S. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of sec. 10, the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of Sec. 10; the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ and the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of sec. 11; the S. E. $\frac{1}{4}$ of Sec. 17; the W. $\frac{1}{2}$ of N. E. $\frac{1}{4}$; the E. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ of sec. 20, and the N. E. $\frac{1}{4}$ of Sec. 30, all in T. 6, N. R. 6 W., I have to say that the following matters in connection with the title to said land need to be corrected. In the said deed the description reads T. 6. s., whereas, it should read T. 6. N., also there is lacking in the title to said land a power of attorney from Hattie M. Lockwood to Herbert S. Griggs, which said power of attorney should be furnished by the Hewitt Investment Co. and placed of record. It also appears that the Hewitt Invest. Co. has not complied with the Oregon laws governing foreign corporations. I therefore, deposit with you herewith, the sum of \$12,800.00 in gold coin of the United States, made payable to the said Hewitt

Investment Co. with instructions that you shall, when the title to the said land shall have been made perfect in me, deliver to the said Hewitt Invest. Co. the said \$12,800 in Tacoma Exchange, and that pending the making of said title perfect in me, you shall hold this money and deed in your possession.

Yours truly,

(Duplicate)

E. Z. FERGUSON.

We hereby acknowledge to have received the said above \$12,800 deposited in accordance with the above instructions. Dated this 3d day of Jan.

J. E. HIGGINS, Cashier."

The letter now handed me purporting to be signed in the name of the Hewitt Investment Company by Henry Hewitt Jr., bearing date January 5, 1906, was received by me probably the next day or two days after January 5, 1906, the exact date I can not tell. I am not familiar with the signature of Henry Hewitt.

Plaintiffs offered the letter in evidence.

The defendant admits the signature to the letter to be the signature of Henry Hewitt Jr., and that he was then the president of defendant corporation, but objects to the letter on the same grounds as to the former letter offered in evidence.

The Court: Very well. The court will make the same ruling.

Marked "Plaintiff's Exhibit 3," and read in evidence as follows:

“Tacoma, Jan. 5th, 1906.

“Astoria Nat. Bank,

Gentlemen:

The Hewitt Investment Co. or Henry Hewitt, Jr., sent you some time ago Deeds to deliver to E. Z. Ferguson on payment of 12800. I think the deeds its seems are faulty & Mr. Ferguson wants them changed you will please return them & oblige

Yours truly,

HEWITT INVESTMENT CO.

By Henry Hewitt, Jr., Pt.”

When that letter was received the deed was returned in reply to that letter on the 9 day of January, 1906; it was returned to the Hewitt Investment Company in compliance with that letter on January 9th, 1906. I know it was transmtted on that date to the Hewitt Investment Company, Tacoma, from the records I have before me.

The plaintiff offered to read a copy of the letter in evidence.

The defendant objected to the letter, not on the ground that it is a copy, but on the same grounds as stated to the proceeding letters.

The Court: Very well. It will be the same ruling.

I know that letter was sent to the Hewitt Investment Company by mail, postage prepaid.

The letter referred to was read in evidence as follows:

“Astoria, Oregon, January 9, 1906. Messrs. The Hewitt Investment Company, Tacoma, Washington.

Dear Sirs:—Referring to yours of December 22, 1905, we herewith return for correction the deed mentioned therein, at the request of Mr. E. Z. Ferguson, grantee named in said deed. We beg to state that on the 3rd inst. Mr. Ferguson deposited in this bank the sum of \$12,800 to be paid to you in Tacoma Exchange when the title to the property purporting to be conveyed in said deed should be perfected in him, and we hold the same subject to above conditions.”

The deed was never returned to me or to our bank.

Cross-examination.

The \$12,000 mentioned in the letter read in evidence was deposited in our bank in money or a bank draft; my recollection is that a draft was made on some bank here in Portland and the money was placed on deposit with the First National Bank here, our correspondent, to the credit of our bank; that is the draft that was sent through was paid and the money deposited with the First National Bank, and I held the deed after it had been sent to me by Mr. Hewitt subject to the conditions stated in my letter. The postal card dated December 23, 1905, called to my attention, is an acknowledgment of the receipt of the letter of December 22, and the deed; the postal card was issued by me or our bank on receipt of the deed and I held the deed as stated in the card.

Postal card marked for identification “Defendant’s Identification A.”

This letter called to my attention bears my signature as cashier of the bank. It was written by me

and I have a copy of it here.

The letter referred to is marked "Defendant's Ident. B."

This money which was paid into the bank was not paid over to Mr. Hewitt or to the Hewitt Investment Company that I know of; the bank continued to hold the money subject to compliance with the conditions stated in the letters, but the bank is not holding the money now. The money was not paid to Mr. Hewitt or to the Hewitt Investment Company to my knowledge.

Mr. FULTON.—We have not contended it was ever paid over. It was ready to be paid. We bring it into court. We claim we have it in court now, ready to be paid yet.

COURT.—Did you say it had been brought into court?

Mr. FULTON.—It has been brought into court, yes, your Honor.

COURT.—You claim, I presume, that the escrow and deposit of the money constituted a contract?

Mr. FULTON.—Yes, which can be specifically enforced.

Mr. YORK.—That is where we differ, if the court please.

Mr. FULTON.—That is, that together with the correspondence of the parties also, showing the conditions.

Mr. YORK.—The defendant contends that there was no escrow; that is, that it did not constitute an escrow.

There was a subsequent deposit of the money in the state court when the plaintiff brought this suit and Mr. Cannon now has that certificate of deposit for some twelve thousand nine hundred odd dollars, which is in our bank.

Mr. FULTON.—If there is any question about that being a genuine certificate, that was deposited by the clerk of the State Court with this bank, why, I would want to identify it. If not, I won't take the time.

The COURT.—I suppose there would be no question about that certificate?

Mr. YORK.—No. What I was going to say is merely this: I have never seen such a certificate, but I might state there was a stipulation that the money paid into the Astoria Bank might be withdrawn and placed in a certificate of deposit which would bear interest, without prejudice to the rights of any party to this suit.

COURT.—In the same bank?

Mr. YORK.—I am not sure about the bank.

Mr. FULTON.—Well, it is in this bank, anyway. The only reason I called attention to it was, if it became necessary to prove we had that money in court, to prove that this certificate is money.

COURT. Yes, very well.

Witness excused.

Mr. FULTON.—This check was sent up here, and in view of the fact that it was drawing interest in this bank where it now is, by stipulation between the parties, which I could not find of record, but which I

had been told had been made on the side, I asked Mr. Cannon not to withdraw it from that bank there where it would be drawing interest. He said that in that case it could not go into the registry of the court; if it went into the registry of the court that he would have to deposit it with the depositary required by the court, which I have no doubt is true. It was only a few days ago that it came up, and I told him that I would take the matter up, and see if we could not agree that it might remain, so far as we are concerned, in the Astoria National Bank, so that it will continue to draw interest. If there is any objection to that, why, of course, I will have Mr. Cannon cash it, and pay it over here, but if this case continues longer, I think it will be to the interest of both parties to have the money drawing interest, and we might sign a stipulation later on so as to release Mr. Cannon. There would be no objection to that, would there, your Honor?

COURT.—No, I think not.

EDWARD Z. FERGUSON, a witness called on behalf of the Plaintiffs, testified as follows:

Direct examination.

I am one of the plaintiffs in this suit. I reside in Portland, Oregon. Am engaged in real estate and dealing in timber lands on my own account and as agent for others. I had some negotiations with the Hewitt Investment Company respecting the purchase of the lands described in the amended complaint in this suit; those negotiations were with Henry Hewitt, Jr.

Q. Now, in the purchase of those lands, in negotiating for them, for whom were you acting, as a matter of fact?

Mr. YORK.—I think I will object to that, if the court please, unless it is shown that if he was acting on behalf of other parties such a disclosure was made to the defendant. It is on the ground, that it is settled in the pleadings that the defendant here had no negotiations with the plaintiff corporation, and never entered into any contract or contractual relations with it, and knew nothing of the plaintiff corporation until this suit was brought; and I think that there is a material question here.

Mr. FULTON.—The suit is in the name of both himself and this company; but my impression is, my understanding of the law is, that while an agent may deal in his own name, he has a right to disclose his principal and take advantage of it, and, of course, the contract in his own name.

The COURT.—The evidence can go in over the objections, and I will settle that in the case.

A. For the Minnesota and Oregon Land and Timber Company, the co-plaintiff in this suit. I heard the testimony of Mr. Higgins about the payment of the \$12,800 in that bank. The money was provided by the Minnesota and Oregon Land and Timber Company. I recognize the letter shown me, bearing date July 24, 1905, dated Astoria, Oregon, addressed to the Hewitt Investment Company, at Tacoma, Washington, signed by me, with answer appended, purporting to be signed by Henry Hewitt Jr.; the letter was

written by me to the Hewitt Investment Company on July 24, 1905, and was sent to the Hewitt Investment Company. There is an answer from Mr. Hewitt on the bottom of it. I know Mr. Hewitt's handwriting and this is his answer on the bottom of the letter in his hand writing.

Plaintiff offered the letter in evidence.

Mr. York.—We object to it on the ground that it is incompetent for the purpose of establishing any contract for the sale of these lands, and we object to the notation at the bottom, a purported answer to the letter signed by Henry Hewitt, on the ground that it is not an answer of the corporation to whom the letter was addressed.

COURT.—Very well. The same ruling will be made in this case as in the other cases.

Marked "Plaintiffs' Exhibit 4," and read in evidence as follows:

"Astoria, Oregon, July 24, 1905.

The Hewitt Investment Co.

Tacoma, Wash.

Dear Sirs:—

You will remember that I have corresponded with you and also had a personal interview with your Mr. Hewitt some time since, in regard to the four claims that you own in 6-6, but at that time the price that you were asking for this land was more than our parties would pay. I notice from the plats in my office that you are the owner of quite a little bunch of land in 5-3 and 5-4, Columbia Co., and I would like to know if you would con-

sider a proposition to trade your four claims in 6-6 for four claims adjoining the land that you own in Columbia Co., providing of course, that the land was as well timbered with as good a quality of timber. Our information on this subject shows the timber to be about the same in both localities.

Hoping you will favor me with an early reply on this subject,

Yours truly,

E. Z. FERGUSON,"

Following this letter, and in longhand, is the following:

"Yours received on my return. I hardly care to trade lands. I might sell the whole bunch at 20.00 per acre. It is heavily timbered, will average from 6 to 9 M per claim. One claim somewhat burnt.

Yours, HENRY HEWITT, Jr."

"Excuse delay."

The land referred to in 6-6 is the four claims that are involved in this suit, described in the amended complaint. The statement in the letter that the land will average 6 to 9 M per claim means 6 to 9 million per claim.

Q. Now, when did these negotiations commence, Mr. Ferguson? Just tell how they commenced, and give a history of it.

Mr. YORK: I think at this time, if the court please, I want to object to any and all testimony by way of oral evidence which may be offered for the purpose of establishing a contract for the sale of the lands involved in this suit, upon the ground that any such testimony is incompetent for the purpose of proving or estab-

lishing a contract for the sale of lands under the statute. And I make this objection at this time as a general objection, if the court will so consider it, to avoid making the objection from time to time. The court will understand that I make it as a general objection to all testimony of this character.

Mr. FULTON: I am willing it should be so understood.

COURT: Very well. The court will take it under advisement, as far as ruling on the objection is concerned. I suppose you want to show this testimony for the purpose of connecting up this correspondence?

Mr. FULTON: Yes, sir. The statute, of course, requires some note or memorandum to be made in writing expressing the consideration and describing the property. We claim we have all that, but we must connect it by the testimony.

The COURT: I understand the points made by both parties. I will allow the testimony to be received.

Q. Just proceed, Mr. Ferguson, and tell your story of these negotiations—what you did.

I don't know just when my first negotiations with Mr. Hewitt began about this land, but it was prior to this date of July, 1905 that I had more or less negotiations about purchasing the land. We were purchasing for the parties who afterwards formed the Minnesota and Oregon Land and Timber Company, this tract in 6-6, and were trying to purchase everything in there. Mr. Hewitt had four claims in there,, or Hewitt Investment Company had four claims in there, and naturally we tried to get those along with the others. In the

course of time, why, we got practically all that we could get or cared to get, with the exception of Mr. Hewitt's four claims. And negotiations had proceeded along—I made a trip or two to Tacoma, and at this particular trip that I made over there, why, we agreed on a deal. The price for the lands was \$20 per acre for which they were offered by Mr. Hewitt, acting as I understood for the Hewitt Investment Company. He claimed to be the Hewitt Investment Company, virtually. I agreed to pay the \$20.00 per acre. I told Mr. Hewitt at the time that \$20 per acre was more than we had paid anybody else in that locality for lands; it was a higher price than we had paid any one else per acre for that land; and I told him that he could take that money and buy other lands in other localities for less money; that we were willing to pay a little more for his land because it filled out our bunch, and completed what we had, and made it more solid, and we wanted it particularly. Mr. Hewitt didn't seem particularly anxious to sell, but, after talking it over and arguing the point with him, and telling him I thought that he could take the money and do better elsewhere with it, anyhow, why, we agreed—that he would take the \$12,800, \$20 an acre, for the four claims, and would send the deed over to the Astoria National Bank. He told me that he would have the deed executed, and would send it over, and I was to go home, which I did, and pay the money. That was about all the main points of the transaction. (It was here admitted by both parties that the commission of 2 ½ per cent referred to in the evidence had been eliminated from the case by agree-

ment of the parties".) This conversation I had with Henry Hewitt Jr., personally at his office at Tacoma. His son was present part of the time. Pursuant to that conversation Mr. Hewitt sent the deed over to the Astoria National Bank to be delivered to me upon the payment of the \$12,800 as agreed. I saw the deed when it arrived and that is the deed concerning which Mr. Higgins testified to having received. I read the deed and am familiar with deeds. For something over 20 instruments of that kind. The deed was a deed from the Hewitt Investment Company, properly executed, with covenants of general warranty and was all regular and properly executed by the Hewitt Investment Company under the seal of the corporation, signed by the president and secretary. The deed was to E. Z. Ferguson, grantee, and the land described in the deed was the Southeast quarter of the Northeast quarter and the Northeast quarter of the Southeast quarter of section 10, the Southwest quarter of the Northwest quarter and the Northwest quarter of the Southwest quarter of section 11, the Southeast quarter of section 17, the East half of the Northwest quarter and the West half of the Northeast quarter of section 20, and the northeast quarter of section 30, all in township 6 south, range 6 west of the Willamette Meridian, all in Clatsop County, Oregon. That description reading township south is not correct; it was not what the deed should be. The land negotiated for was Township 6, north of range 6 west, instead of township 6 south; there is no township south in Clatsop County. All lands in Clatsop County are in some township north and some range west. Our attor-

ney discovered the error in the deed, otherwise the deed was in due form. It contained a certificate of acknowledgment and was properly acknowledged. I think I wrote Mr. Hewitt calling his attention to the error. The letter handed me, dated January 3d, 1906, to the Hewitt Investment Company was written by me and was forwarded by United States mail to the Hewitt Investment Company on that date. (Defendant admitted having the original and agreed that the copy might be used.)

Plaintiff offered the letter in evidence.

Defendant objected to the admission of the letter on the same grounds as to the other letters as being incompetent for the purpose of establishing a valid contract of sale.

The COURT: Very well. The same ruling will be made.

Marked "Plaintiffs' Exhibit 5," and read in evidence as follows:

PLAINTIFFS' EXHIBIT 5.

"Astoria, Ore. Jan. 3, 1906.

Hewitt Investment Co.,

Tacoma, Washington.

Gentlemen:

On Dec. 26th I wrote you in regard to the title of your land which I am purchasing, stating that there was lacking in the title, a power of attorney from Harriet M. Lockwood, to Herbert S. Griggs, but up to this time, have no reply. My attorney has examined the abstract in regard to this title, but in addition to the power of attorney which is lacking, he finds two other matters which need attention.

In the deed, which you sent here, the description reads T. 6 S. instead of T. 6 N., also it does not appear that the Hewitt Investment Company has complied with the Oregon laws governing foreign corporations. I think for your own protection, that you would wish to straighten up this last matter on account of your other land in Oregon.

I do not know how seriously this affects the title, but think it would be better if it was straightened up. I have today deposited in the Astoria National Bank, the sum of \$12800, the sum to be sent to you in Tacoma Exchange when the title to this land is made perfect in me. I do this so that you will understand that I am not endeavoring to gain time, but am ready and willing to take over the deal whenever it is in shape for delivery.

In regard to the commission of 2 1-2 per cent, as mentioned in your letter, I think it was thoroughly understood between myself and Mr. Henry Hewitt that I was to have the 5 per cent, and I think of course, that I should have it, but if the Company absolutely refuses to allow more than 2 1-2 per cent, I will, of course, take the lands anyway. You can inform Mr. Hewitt that I will probably send him today or tomorrow maps and data regarding the other timber proposition that I talked with him about. I think that one of them, at least, will appeal to him. Trusting you will favor me with an early reply,

Yours truly,

E. Z. FERGUSON."

Mr. FULTON: Now, in connection with that letter last read, and the correspondence preceding it, I want

to read into the record, your Honor, two letters written by Mr. Hewitt to Mr. Ferguson, which are attached to the deposition of Mr. Hewitt and by him identified as his letters, but I would like to have them in the record in this order.

COURT: Very well. I suppose you want the same objection to that?

Mr. YORK: Same objection, if the Court please.

COURT: Very well. Same ruling.

Mr. FULTON: I am reading Plaintiffs' Exhibit "B" attached to the deposition of Henry Hewitt, taken by the plaintiffs. The letter heading is "Hewitt Land Company, Tacoma, Wash."

"Tacoma, Dec. 22, 1905.

E. Z. Ferguson,

Dear Sir:—We have today sent deed for lands to Astoria N. Bk. which they will deliver to you on payment of 12800.00. I will send you a check for commissions when money is received of 2 1-2 per cent. Our directors would not allow more, & in fact did not like to deed the land at all. We consider this land worth 30,000. However, if you can find us the land you promised, will send my son or another good cruiser to look over lands & in some way make good my promise to you. Now hustle & find the other land. It must be comatable and good logging chance finally.

Yours, HENRY HEWITT, Jr."

And I will read Plaintiffs' Exhibit "A" attached to the same deposition. Heading of the letter:

“Hewitt Land Company
Tacoma, Wash.”

“Tacoma, Jan. 5th, 1906.

“E. Z. Ferguson,

Dear Sir:—Your favor of Jan. 3 received. I have written Astoria Nat. Bank to return deeds & as you suggest will make out new deeds. Mr. Griggs has the old Hattie Lockwood deeds signed by him as power of attorney & will send new deed for her to sign. It may take some little time.

“About the commission, the Co. some time ago passed resolutions to only allow 2 1-2 commissions for sales of lands, of which I was not informed, & besides this when I brought the matter up the directors all but myself were against selling & would not have consented at all only to accommodate me. I should have brought the matter up. Of course you know what any officer promises is only good for his best endeavors to carry out his promise. You are mighty lucky to get the land at all.

“Now about the Oregon Populistic Law, we think its absolutely unconstitutional & this land was deeded to Hewitt Investment Co. before this law came into effect & we have done no business since. In fact I did not know of the law or its provisions. I intend to convey other lands to H. Hewitt, Jr. & do no more business in Hewitt Investment Co. Will that do or do you advise me to comply now with the law? The Co. is incorporated for \$50,000—\$37,000 paid in & its lands mostly in Washington. How much & to whom should this be paid to. I suppose its a state law.

"Now about those lands you send me descriptions. The Red & Black look good providing the mill gets rates to Eastern points same as Portland. Do the Oregon Short Lines assume this extra rates. If Hammond owns this road evidently he has already bottled up this poor mill Co. You say timber can be bought for 30c, he charges them \$2.00, how is this and what will he do to us if we buy that other timber & will he not also bottle us up? What is the quality of timber. Is it old growth yellow fir & high land spruce & how large and what proportion spruce, is there any cedar &c. & how abt. quality? How much hemlock & what will that cost, if anything, & dont you know of something better that we should have a fair chance to succeed if we operate in competition with Portland?

"Yours, HENRY HEWITT, Jr."

Down below the signature are these words:

"Advise bank to return deeds, Hewitt."

The letter dated January 3, 1906, addressed to Henry Hewitt, Esq., Tacoma, Washington, was written by me to Mr. Hewitt, personally on January 3, 1906.

Plaintiff offered the letter in evidence.

Defendant objected to the admission of the letter on the same grounds as heretofore stated.

Letter marked "Plaintiffs' Exhibit 6," and read in evidence as follows:

Jan. 3, 1906.

Henry Hewitt, Esq.,
Tacoma, Washington.

Dear Sir:—

This morning I wrote to the Hewitt Investment Co., which letter you will undoubtedly receive about the

same time that you receive this, and at noon today, I received your letter of the 2nd, to which I hasten to reply. I think, in order to get this matter straightened up with the greatest possible speed, it would be best for you to prepare a new deed making it just the same as the former deed, excepting to state that the land is all in T. 6 N. R. 6 W., W. M., instead of T. 6 S. as it now reads.

It is evident from the deed in the bank that you have a copy and can see how this mistake occurred. This deed you can send to the bank to be substituted for the one that is now in their hands.

If, at the same time, you have an original power of attorney to Mr. Griggs from Harriet M. Lockwood, it could be sent over and recorded in this county. If you haven't the original, you can have a certified copy made from the records there which will answer the same purpose, but before doing this, I would suggest that you examine the power of attorney carefully and see if it conveys sufficient power to enable Mr. Griggs as her attorney to convey land in Oregon, otherwise, it would be of no use and it would be necessary to obtain a deed direct from Mrs. Lockwood. Under the Oregon laws, the wife's interest is absolutely necessary to have. We are very particular in regard to our titles, because we expect to sell this land some day and do not wish to have any trouble when the time comes.

In regard to the Hewitt Investment Company's having failed to comply with the Oregon laws governing foreign corporations, we will not let this delay the deal, but will take it for granted that you will straighten it up

at your leisure, but would like to know, when you write me the exact amount of the Company's incorporated capital.

Thinking it possible that you may not be fully informed as to the Oregon laws, I inclose you herewith some circular matter that I have received from the Secretary of State as I happen to have a surplus of them on hand.

Trusting that you will find the power of attorney all O. K.,

Yours truly, (Signed) E. Z. FERGUSON.

P. S. In regard to the commission of 2 1-2 per cent instead of 5 per cent as you agreed, I hardly think that you should cut me off from this, as it was thoroughly understood between us, and I believe that after you have considered the matter fully, that you will persuade the Company to allow it. However, in any event, we want the land whether the company will allow us 5 per cent or not. I am inclosing you under separate cover, one of the propositions that I talked about when I was in your office.

E. Z. F.

The letter handed me, dated January 8, 1906, addressed to Henry Hewitt, Jr., was signed by me and sent by me to Mr. Hewitt on that date.

Plaintiff offered the letter in evidence.

Defendant objected to the admission of the letter upon the same grounds as heretofore stated.

The COURT: Very well. Same ruling.

Marked "Plaintiffs' Exhibit 7," and read in evidence as follows:

"Astoria, Ore. Jan. 8th, 1906.

Henry Hewitt, Jr.

Tacoma, Washington.

Dear Sir:

Replying to your favor of the 5th, I have to say that the bank has informed me that they would return the deeds to you by tonight's mail.

"I suppose it will take two or three weeks for you to get them straightened out. In any event, the money will be left at the bank for you as soon as the title is completed.

In regard to the commission, we will let it go as you say, at 2 1-2 per cent. As to the matter of the state tax against corporations, I think that you had better write to Hon. F. I. Dunbar, Secretary of State, for a statement as to the present standing of the corporation. I have had no experience with foreign corporations, and do not know just as to how the matter will stand. I am under the impression, however, that he will advise you that you are liable for the tax for the past three years, and under the circumstances, will allow you to pay this amount without forcing a fine, and I think there is some provision whereby you can withdraw from doing business in the state if you so desire.

About a year ago, I noticed something in the Oregonian where a suit had been started to test the validity of the law, but have heard nothing from it since, and the attorneys that I have spoken to here, do not seem to know of any decision in the matter.

The Secretary of State will probably give you all the information that you desire.

As to the land in 5-9, in connection with the Seaside Mill Co. I have to say that the statement that you make is undoubtedly true, and that Hammond has this mill bottled up to the extent that they must depend upon him almost entirely for future timber. This was the very reason why I thought that it would be a good thing for some other party to own this timber in 5-9 as they would be in a position to compete with Hammond in selling this mill its timber. You, of course, are much better informed in a matter of this kind than I am, and it might be that it would not work out in the way that I think, yet I believe that it could be sold either to the mill or to the Hammond people later on, at a good profit. I have no cruise upon the land, but think it is a very fair bunch from what I have heard of it. I have for sale, however, a tract of 5000 acres at \$17 per acre. This is on the Nehalem slope about 6 miles further down the river than the lands that we have just purchased from you. If you think you would care to consider that, I will send you a plat of it, the estimates, and conditions.

Some time this week, I will send you a plat of Columbia County, showing your lands there, as well as the surrounding timber, and statement of what I believe would be possible in adding to your holdings in that locality.

Yours truly,

(Signed) E. Z. FERGUSON.

I informed Mr. Hewitt that the Minnesota & Oregon Land & Timber Company was purchasing the land; I told him that I was a stock holder in the company, but

was buying the lands for the company. I saw Mr. Hewitt after the deed was sent back for correction. I think I wrote him in regard to it and I know went to Tacoma and saw him about it about that time. I remember of going to the records in Tacoma and finding a power of attorney from Lockwood to Griggs which was required to straighten out the title and concluded that by having a certified copy made it would help straighten that out. I told Mr. Hewitt of that and that we would be satisfied so far as the title was concerned with that power of attorney. I remember of talking with him about getting the deed again or having him execute a new deed and he took the stand that they didn't care about selling the land or letting it go; that was the general tenor of the conversation, but I could not state definitely just what was said. I requested the deed of him. That was some time before we brought this suit. He did not redeliver the deed or surrender the corrected deed.

Cross Examination.

I had conversations with Mr. Hewitt at Tacoma two or three times. I was over there two or three times, anyhow, and the matter of the transaction in regard to this land was discussed by me with Mr. Hewitt at that time. Mr. Hewitt did not then state that he desired to procure the title to the other lands referred to by way of trade but the matter was this way: I was presenting the matter to Mr. Hewitt and endeavoring to convince him that he could take this same money and buy other timber just as good and just as well located for less money. We needed these lands because they were in our particular bunch and I was willing to pay more for

them than we had been paying any one else. Mr. Hewitt stated that he or the Hewitt Land Company had other lands up there and I knew of four or five claims which had been presented to me as being purchaseable at a price which was considerable less than what we were offering him. I made that statement to Mr. Hewitt and told him about that land. I told him he could take this money and go up there and purchase those other claims which would be nearer his own holdings and Benson's logging road was building right in there and it would be better land for him if he could purchase it for less money. I probably represented to him that those lands had been offered to me for these prices; I had no option on them; I think I represented to him that I thought I could get them for him; not that I positively could but I think I told him that I thought I could.

Q. Didn't he state he desired to obtain those other lands because they lay adjacent to lands which he or one of his companies then held?

A. Well, he didn't state positively that he would take them; he stated that he might purchase them; he would want to cruise them; he would want to see what they were and know whether they were good lands or not. It was not understood by me that the proceeds to be received on the conveyance of the lands covered by the deed were to go into the purchase of the other lands. I had no authority to take that money and put it in there. I understood it was his intention to take this money and buy other lands with it, and possibly these lands that I was speaking about.

Q. And didn't you represent to him that you could

procure those lands for him?

A. No, sir, not positively. I had no option on them. I told him what they had been quoted to me, the prices they had been quoted to me, and I think I told him who by, and the circumstances; but I had no option on them; I had no way of saying I would deliver them because I had no positive assurance that I could. I think I agreed with him to furnish him a map showing the location of those lands. I think I did furnish him such a map. I am not positive about that but I think I sent him a map showing the lands. I did not subsequently get those lands for him. He didn't request me to go ahead and get those lands. He wrote over asking how about those lands, or something of that kind, in his correspondence. I didn't know whether he would take them or not. I understood that he would expect that I would see what I could do in regard to them and whether I could get them for him.

Q. To carry out that intention you did endeavor to get those lands for him?

A. Why, I didn't because we didn't close this other deal. If he had sent the deed back and we had closed this deal I would have gone on and tried to get those lands for him, but after he refused to send this deed back, the whole thing was up.

Q. After this deed had been returned to Tacoma, and you requested that it be corrected and sent back to Astoria, did not Mr. Hewitt then decline to do it because you either failed or refused to get the other lands for him?

A. Oh, he may have used that as an excuse for not

sending the deed back, but there wasn't any bargain or trade whereby I was to furnish the other deeds as a part of the consideration of those lands. These lands were bought for straight \$20 an acre.

Q. Did not he state to you that that was the reason he declined to return the deed to Astoria?

A. I think he did; after he got the deed back I think he used that as one of the reasons why he would not return the deed. I talked with Mr. Hewitt in Tacoma when I went up there, subsequently, and found the power of attorney was of record. I think that was while the deed was still in the bank at Astoria that I went to Tacoma and found this power of attorney, but I am not absolutely positive about that. It may have been after the deed was returned. The deed was a general warranty deed and contained just the covenants of a general warranty deed.

Redirect Examination.

This talk about my looking up other lands for him was not a part of the consideration for the purchase of the lands in question. It was made no condition in regard to the purchase of the lands in question. This suit was commenced in the State Court in Clatsop County. At the time I commenced the suit I deposited the purchase money in court with the complaint. I think we withdrew the money from the bank to make the deposit.

Recross Examination.

At the time I withdrew the money from the bank I didn't ask or obtain any consent of Mr. Hewitt to such withdrawal. I considered the money was there sub-

ject to my order and I had a right to withdraw it without obtaining any consent of Mr. Hewitt. That was after he had refused to send back the deed, and when I had to bring suit to get the deed.

Plaintiff offered in evidence the certificate of the Secretary of State regarding compliance with the Oregon laws by the plaintiff corporation.

Marked "Plaintiffs' Exhibit 8."

Plaintiff offered in evidence the receipt of the state Treasurer for the taxes for the current fiscal year on the corporation.

Marked "Plaintiffs' Exhibit 9."

It was considered admitted that the plaintiff is a corporation and had authority to purchase the land, and that \$12,800 was deposited by plaintiffs in court as a tender at commencement of this suit.

Plaintiff Rests.

The defendant thereupon moved for a judgment of non-suit and for the dismissal of the case upon the ground that there was not sufficient evidence upon which the plaintiff was entitled to have the relief sought by the amended complaint.

After argument the court overruled the motion at this time upon the understanding that it would be given full consideration on the final hearing.

Motion for non-suit denied and exception allowed defendant.

Defendant's Evidence.

HENRY HEWITT Jr., witness called on behalf of defendant, testified as follows:

Direct Examination.

I reside at Tacoma, Washington and am acquainted with Mr. Ferguson, the witness who preceded me. I had some negotiations with Mr. Ferguson in regard to the sale of certain lands belonging to the Hewitt Investment Company in this state in 1905 and 1906; I had personally agreement and talk with Mr. Ferguson. He brought the matter up by writing to me to buy these lands; that was before we ever made any deal. I wrote him personally that the lands were not for sale but thought if he would buy the whole bunch, that is all the lands, I would sell them for \$20 an acre. I mean these particular lands that are in litigation and the balance of the lands that I owned on the Nehalem River. The lands on the Nehalem River and all those lands were all of them owned by the Hewitt Investment Company. I am interested in another corporation called the Hewitt Land Company but that is an entirely separate corporation. He wrote back and made me an offer for those particular four quarter sections of \$8,000. (The plaintiff thereupon demanded that the witness produce the letter referred to and objected to oral testimony of its contents but the witness did not produce the letter claiming that he had not been able to find it.) That was some time before this deal and that is what brought it up. He wrote back and offered \$8,000 and I refused it and that ended there. The letter brought to my attention signed E. Z. Ferguson, dated August 17, 1905, was received by me through the mail.

It was admitted that the letter was signed by E. Z. Ferguson.

Letter offered in evidence, marked "Defendant's Exhibit C," and read as follows:

"Astoria, Oregon, August 17, 1905.

"Hewitt Investment Co.

Tacoma, Wash.

Gentlemen:

I wrote you some time ago regarding a trade of lands by exchanging your four quarters in T. 6 N. R. 6 W. for a like amount of land adjoining your holdings in Columbia County, but have had no reply.

"Please let me know if you will consider a proposition of this kind and oblige,

Yours truly,

E. Z. FERGUSON."

That letter was received by me as leading up to the transaction. He offered me \$8,000 by letter but no transaction was closed or agreed upon at that time. The agreement under which the deed alleged in the amended complaint was executed was made a very short time before we made the deed. I think it was in the month of December, 1905. All prior negotiations up to that time had been closed. Mr. Ferguson came personally and convinced me that it would be a good thing for me to let him have these lands and he would buy me those other lands from 25 to 30 cents a thousand. That was when I told him that I would endeavor to get this deed from our company in consideration of his getting me those other lands; that was a verbal conversation between me and Mr. Ferguson at Tacoma. The prior negotiations had ended and the matter was brought up again then in December. He induced me it was a good

trade, which I considered it was, to make the exchange. I told him I didn't have the money but I would sell these lands at the price he made providing we could get the other lands.

Q. State whether or not he definitely agreed that he could or would get the other lands to deliver to your company.

A. Why, he told me he had the offers and could get the other lands at that price; that was the inducement for me to get my son to sign the deed. The consideration was getting these other lands for less money, adjoining our other lands. If those other lands had not been agreed to be procured for our company I would not have procured from our company the execution of this deed. My son absolutely refused to sign the deed and I told him that Ferguson had promised to get me these other lands and I believed he was an honorable man and would do it. My son whom I speak of as John Hewitt. He was secretary of the Hewitt Investment Company. I was president of the Hewitt Investment Company, but I told Mr. Ferguson at the time that I could not act for the company and he knew it; all I could do was endeavor to get him the lands if he would carry out his agreement. That was fully stated, over and over again, to Mr. Ferguson, prior to the execution of the deed. He knew I could not carry it out without that; I had no authority to. He said he would go back and hunt up the lands and send me a map with the descriptions and I was to send my son right away and look the lands over, see that they had the amount of timber and that it didn't cost over 25 to 30 cents a thousand, equally as good timber,

or nearly so, as the timber I was going to induce the Hewitt Investment Company to deed to him. I have been interested in timber lands in Washington and Oregon for 23 years, buying and selling. I have bought and sold three or four billion feet of timber and am connected with other lumber companies. During the years 1905 and 1906 I was familiar with the value of timber lands in Columbia and Clatsop Counties, Oregon. We considered the consideration named in the deed only a nominal consideration. I told him at the time the lands were worth \$30,000 and I think I wrote him afterwards that they were worth \$30,000. That amounted to about fifty or sixty cents a thousand, and he was going to buy me the other lands at from 25 to 30 cents adjoining my other lands. The consideration was getting those other lands at the prices represented by Mr. Ferguson. After this deed was sent to the bank at Astoria neither I nor the Hewitt Investment Company ever received the money or any part of it. I or the Hewitt Investment Company never at any time received any consideration whatever for the transfer of these lands. We sent the deed to the bank and told me to deliver it to Mr. Ferguson if he paid the money, and the bank had no authority to turn it over or hold it, or change what the deed was sent for. With reference to the execution of the deed there never was any authority given by the Hewitt Investment Company, through its president and secretary to execute this deed by resolution or otherwise. There was not at any time any meeting of the board of trustees or stock holders of that company at which any action was taken authorizing the sale of the

lands involved in this suit, nor was any action ever taken by the finance committee of the Hewitt Investment Company authorizing this transaction. There absolutely never was any resolution of the corporation; I know absolutely there wasn't any authority given to execute the deed.

COURT: Did the deed recite any resolution of the kind?

Mr. YORK: Well, if your Honor please, the deed cannot be found.

Mr. FULTON: I think Mr. Hewitt in his deposition testified that it did; that the deed said there was a resolution.

A. Oh, well. The deed might have said it; but there was absolutely—never was—I don't think so. I know absolutely that there never was any authority.

To induce my son John who was the secretary of the company to execute the deed, as secretary, I told him that Mr. Ferguson was going to get us those other lands and he had sent us a map and I told him to hustle up and get them; and in the mean-time I had written to the owners of the other lands which he agreed to procure about the other lands and they asked me \$1.50 in place of the terms Mr. Ferguson stated. Ferguson sent me a map and I wrote to some of them, but I can not tell you their names now. I found that the lands could not be procured at the prices represented by Mr. Ferguson but that they cost three times what he represented. I figured that he was fraudulently deceiving me on the price of the lands down there for the purpose of getting these four quarter sections. When the deed had been

returned from Astoria I and the company declined to correct it or execute a new deed because in part he asked us to do something that we could not do and we thought he was doing that for the purpose of delay and not paying the money and then we made up our mind that he had defrauded us and was not going to get us the other land, and that he was not going to carry out his part of the agreement, and consequently we refused to return the deed or to try to correct it. About that time or shortly after Mr. Ferguson came to Tacoma when we had a conversation. He tried to have me correct the deed or give him a new deed and I told him our company absolutely refused to make any new deed or do anything unless we could get the other lands. I then made a demand upon him to get the other lands. He said he could not get them without the money and he would have to have this other money to get them with. He said he would have to sell these lands to his company and that is the first time that I knew anything about his company. He said he would have to sell them to some company that he was forming. I never knew anything about his other company until afterwards. In the transaction leading up to the execution of the deed he made no representation that he was acting for any other person than himself; he was acting so far as I knew, for himself entirely. He said he wanted these particular lands because he was trying to form another company, or had formed another company, and he wanted them to fill out his complement to them. I had no knowledge then in regard to the plaintiff Minnesota and Oregon Land and Timber Company. I first heard of

that company afterwards. At the time he said he was trying to form another company, but I didn't have any trade with them or know anything about them. My agreement or talk was all with Mr. Ferguson personally. I was acting in that transaction as a personal matter and told him I would try and get that deed for him if he would get me the other lands, but I had no authority to contract or sell the lands without authority from the company. He knew that and I so informed him before and after the execution of the deed.

The defendant then offered in evidence so much of the secretary's record book of the Hewitt Investment Company as covers and includes the by-laws of that company, and the minutes of meeting of stock holders held November 28, 1890, the minutes of trustees meeting held May 29, 1891, minutes of trustees meeting held January 2, 1901, minutes of stock holders meeting held May 31, 1902, and the minutes of stock holders meeting held May 30, 1903.

Records offered were admitted in evidence marked "Defendant's Ex. D," "Defendant's Ex. D-2," "Defendant's Ex. D-3," "Defendant's Ex. D-4," "Defendant's Ex. D-5," and "Defendant's Ex. D-6."

The letter handed me dated December 22, 1905, addressed Henry Hewitt Jr., signed E. Z. Ferguson, was received in the mail by me.

It was admitted that the letter was signed by E. Z. Ferguson. The letter was offered and read in evidence marked "Defendant's Exhibit E," and read as follows:

"Astoria, Oregon, Dec. 22d, 1905.

Henry Hewitt, Jr.

Tacoma, Wash.

Dear Sir:—

I have just completed the abstracts for your land, but have not yet given them to the attorney. I have however looked them over myself and find one matter that needs attention. There are four deeds to the Hewitt Investment Co. and each is signed Lester B. Lockwood, Hattie M. Lockwood By Herbert S. Griggs, her attorney in fact, and we do not find any power of attorney of record from Hattie M. Lockwood. Please inform me if you have the P of A and if so send it with your deed to the Bank; if not, can you get a deed from her? If the attorney finds anything else will let you know, but I do not think there is anything else. Of course you are aware that in Oregon the wife has a dower and her signature is more important than in Washington.

"Up to this time I have been too busy to send you the map of the other land, but will do so soon. There is quite a little work to make it up.

"When can I expect the deed?

Yours truly,

E. Z. FERGUSON,

179 11th Street."

The postal card bearing date, Astoria, Oregon, December 23, 1905, handed me marked "Defendant's Identification A," was received by me in the mail about that date.

Plaintiff offered in evidence defendant's Identification A which was admitted in evidence marked De-

defendant's Exhibit A and read in evidence as follows:

"ASTORIA NATIONAL BANK

Astoria, Oregon, Dec. 23, 1905.

Your favor of the 22nd inst. received with enclosures as stated. (Entered for collection) J. E. Higgins, Cashier."

The letter dated April 30, 1906, addressed The Hewitt Investment Company, signed J. E. Higgins, marked "Defendant's Identification B," was received by me in the mail.

Defendant's Identification B offered in evidence and admitted in evidence marked "Defendant's Exhibit B," as follows:

"Astoria, Oregon, April 30th, 1906.

Mess. The Hewitt Investment Co.

Tacoma, Wash.

Dear Sirs: On Jan. 3, 1906, Mr. E. Z. Ferguson deposited in this Bank \$12,800, to be paid to you in Tacoma exchange when the title to the property described in the deed of your company was perfected, the said deed being returned to you for correction on Jan. 9, 1906. We still hold the money. Will you kindly let us know whether or not there is any possibility of the trade being closed, and kindly state whether or not you desire us to hold the money any longer.

Very truly yours,

(Answered) J. E. HIGGINS, Cashier."

The letter handed me dated Astoria, Oregon, January 25, 1906, addressed Henry Hewitt Jr., signed E. Z. Ferguson, was received by me in the mail.

It was admitted that the letter was signed by Mr. Ferguson.

Plaintiffs offered the letter in evidence which was admitted marked "Defendant's Exhibit F," and read in evidence as follows:

DEFENDANT'S EXHIBIT F.

Astoria, Oregon, January 25, 1906.

Henry Hewitt, Jr.,
Tacoma, Wash.

Dear Sir:—

Your recent letter received; it has no date, but was probably written January 13th as the letter to the bank, to which they have called my attention, is dated the 13th. I have just returned from Portland, which will explain why I have not replied sooner to the letter.

I noticed in the letter to the bank that you say that I promised to get you other lands just as good for 30c per 1000; you will please pardon me for contradicting you on this point, but you have either misunderstood or misconstrued my conversation. What I said was that from 25c to 30c per 1000 was about as high as any of the timber buyers were paying in the Nehalem and that I was satisfied you could take the money that you received for this land and buy other lands for a less price, this was to convince you that I was paying what I considered a big price for your lands. I also mentioned particularly that there were some lands adjoining the Hewitt Investment Company's lands in Columbia County which I felt certain that you could purchase for less than you were receiving and that in my opinion it would pay you better to take this money and put it in

there, and in the course of the conversation I said I would make you a map showing this land and send it to you. Since coming home, I have been too busy to get this up as I wanted to, but will enclose the map herewith and will attach to the maps such explanation as I hope will make clear to you what I mean.

Now, in regard to paying interest on the \$12800 until you perfect the title, it seems to me that 8 per cent would be too high as money can be procured easily at 6 per cent or less. I would have to keep the money ready to be paid you at any time and could not have the use of it, yet I realize that it does you no good either, lying in the Bank, and before deciding whether to pay interest or not, I would like to know how long a time you would wish to have to straighten the title, so as to know how long I might have interest to pay.

If it can be arranged satisfactory to all of us, I would rather pay the money over to you. In case we would pay the \$12800 to the Hewitt Investment Company and take its Warranty Deed to the land, would you and the company be willing to give me an agreement and assurance that you would perfect the title, say within a year, or longer, if need be?

I see no reason why we cannot fix this up without difficulty; the Power of Attorney may turn up, or in any event, Mrs. Strong will get through her honeymoon sometime and come home. Do you know when she procured her divorce? It may be that this would straighten the matter; in any event, it seems to me that if you get the money and we know the title to the land is going to be perfected, that is all that is necessary and we can

all sleep the sleep of the just.

At your rate of interest, the money in the bank is losing nearly \$100 a month and I hope we can get it into your hands with the greatest possible speed and would therefore request an early reply.

Yours truly,

E. Z. FERGUSON.

The receipt of this letter was the first time that a misunderstanding appeared to have arisen between me and Mr. Ferguson.

I have made search for all of the correspondence between myself and Mr. Ferguson and have not been able to find any other letters than those produced. The Hewitt Investment Company never complied with the law of Oregon relative to foreign corporations in this state. The Hewitt Investment Company has done no business in this state but to hold land. It has had no office in the state. We have bought all these lands but didn't sell any. This is the only dealing we have had in the state. The Hewitt Investment Company was in the nature of a holding company merely. It took the title to the lands and we supposed as a foreign corporation it could sell them. We just bought the lands and would hold them until we would sell the whole bunch. That is what I tried to talk to Mr. Ferguson, to sell him the whole bunch. We did not procure any correcting deed or the power of attorney from Mrs. Lockwood. The Hewitt Investment Company never executed any other deed than the one that was sent to Astoria and returned. The Hewitt Investment Company at the present time holds the title of record to the lands in-

volved in this suit and the Hewitt Investment Company has paid the taxes upon these lands. The Hewitt Investment Company paid taxes on these lands for 1905, \$149.40; taxes paid for 1906, \$180.73; taxes paid for 1907, \$177.69; taxes paid for 1908, \$192.86; taxes paid for the year 1909, \$209.98; taxes paid for the year 1910, \$223.80. Taxes paid for 1911, \$287.97.

The tax receipts were offered and admitted in evidence, marked "Defendant's Exhibit G," "G-2," "G-3," "G-4," "G-5," "G-6," "G-7."

Cross Examination.

Questions by Mr. FULTON:

Now, you have introduced, or your counsel has introduced after you identified it, a letter of August 17, 1905, in which Mr. Ferguson wrote you as follows: "I wrote you some time ago regarding a trade of lands by exchanging your four quarters in T. 6 N. R. 6 W. for a like amount of land adjoining your holdings in Columbia County, but have had no reply. Please let me know if you will consider a proposition of this kind." Now, you wrote back declining that proposition, didn't you?

A. No, sir, I don't think I did.

Q. You don't? You were willing to do it, were you?

A. Why, no, I didn't answer it, and nothing was done, but he came up to talk it over, and convinced me that it was a good trade to make, verbally.

Q. What is that?

A. He came up verbally, himself—he came up and we talked it over verbally, and the trade was made verbally."

Q. You didn't, as a matter of fact—

A. Nothing was closed on any of these.

Q. When he came up and you talked it over verbally, did you agree to it?

A. I told him that I would try to procure him this deed from the Hewitt Investment Company for those lands, and he convinced me that it was a good trade for us to have the other lands adjoining our own.

Q. Now, you say you didn't tell him that you wouldn't make that trade?

A. I told him I would make it.

Q. What?

A. I told him I would, verbally.

Q. I ask you if you didn't write to him in response to his request as to whether or not you would trade these lands, as follows:

A. What is the date of that letter?

Q. No date to it.

A. I testified when I first commenced—

Q. I will ask you if that is your writing?

A. When I first commenced I testified to this correspondence.

Q. Look at that and see if that is your writing.

(Witness examines letter.)

Q. That part is not. That is his letter to you.

COURT: That has been introduced?

Mr. FULTON: Yes, sir.

A. I testified when I first came that I offered him—

Q. Answer the question—is that your writing, Mr. Hewitt?

A. Yes, sir.

Q. Now, this writing that is appended to the foot

of this letter of July 24, 1905, was in response to this letter from Ferguson to you repeating the request under date of August 17, 1905, wasn't it?

A. Well, I couldn't tell you. I presume so.

Q. You had evidently been away, hadn't you?

A. Yes, I couldn't tell you that.

Q. Well, you say in this letter you had been away, and therefore he wrote again to you.

A. Yes, I—

Q. And then didn't you answer as follows: "Yours received on my return." That is answered by indorsing on the foot of his letter "Yours received on my return. I hardly care to trade lands. I might sell the whole bunch at \$20 per acre. It is heavily timbered, will average from six to nine million per claim. One claim somewhat burnt." Now, you wrote that, didn't you?

A. I think I did.

Q. Then you did decline to make a trade, didn't you, and said that you preferred to sell?

A. Yes, the whole bunch.

Q. Well, but you declined to make the trade, didn't you?

A. At the time, yes. But then he came up.

Q. Why do you now say that the consideration was that there was to be a trade?

A. Because he came up, and we verbally changed it, and agreed to make a trade.

Q. Agreed to make a trade?

A. Yes; after all these letters.

Q. Why didn't you say something of that—

A. That is after he wrote back and offered me—

Q. Why didn't you say something of that in your letters that you wrote to the bank?

A. Because I didn't think it was any of the bank's business.

Q. Well, why did you write to the bank? I show you plaintiff's exhibit 1, and ask you if that is your signature?

Mr. YORK: It was offered in evidence.

Mr. FULTON: It is admitted to be, I believe.

A. That is my signature.

Q. Now, under that date you wrote to the bank saying "Please deliver the enclosed deed of lands in 6-6 west to E. Z. Ferguson for \$12,800 net to us in Tacoma funds." Now, you didn't say anything there about him depositing any deed making any trade, did you?

A. The bank didn't have anything to do with it.

Q. Well, you authorized them to let him have the deed?

A. Yes.

Q. You hadn't received any deed or contract or anything for any of these other lands, had you?

A. I received Mr. Ferguson's letter, and I received the maps, and he said he would send me—

Q. Did you receive a letter from him in which he said that he would get these lands for you?

A. He said he would send the map and would get prices.

Q. What letter was that?

A. I think it was here.

Q. Is that the letter that was just read here, just introduced?

A. He came up, you know, and made the agreement verbally. All these letters didn't amount to anything.

Q. Is that this letter of January 8, 1906?

A. What does it say?

Q. Look at that, and see if that is the letter. That is one that your counsel just had in his hands.

A. I received this letter from Mr. Ferguson.

Q. There is nothing about any timber in that, is there? That is under January 8th.

A. You have got some of my letters on deposit here where I told him to hustle up and get me that land.

Q. Well, I will come to that hustling letter. I want you to tell me the letter that he wrote to you.

A. I can't remember all these letters, my dear friend.

Q. Can you point out a single letter?

A. They are all here.

Q. Can you point out a single letter in which Mr. Ferguson promised you to get you these lands? You say you had this letter.

A. My agreement was verbal with him to get me these lands. Then I had his letters.

Q. You said a moment ago, in response to my question why you told the bank to deliver that deed on the payment of the \$12,800, and asking you at the same time why you didn't insist on having a deed for these other lands at the same time, you said you had Mr. Ferguson's letter promising to get those lands. Now, where is that letter?

A. I don't think I had such a letter.

Q. Why did you say you had?

A. I made a mistake if I did.

Q. Did you get that letter from Mr. Ferguson, which is one your counsel just had?

A. I did, yet; I think I testified.

Mr. FULTON: I wish to offer that. That is the one counsel had.

Marked "Plaintiffs' Exhibit 10," and reading as follows:

PLAINTIFFS' EXHIBIT 10.

Astoria, Oregon, January 26, 1906.

Henry Hewitt,

Tacoma, Washington.

Dear Sir:—

Attached herewith is the map of Columbia County which I promised to send you when I was in Tacoma. I have marked on the map the lands of the heavy holders of timber, and you can tell from the margin who these owners are. You will see that sooner or later three or four of them will be anxious to purchase your lands. The Sage Land & Improvement Co. own a great deal of land further South, which I have not marked on the map. I have crossed with a lead pencil the bunch of land adjoining yours which I said, in my opinion would be better for you to own than the lands in 6-6. This part of Columbia County is not nearly so rough as Clatsop County, the land is more rolling and more like Washington, making it much easier for railroads to operate, and I believe that it would be worth your while to take the money that you get out of the 6-6 land and buy this land that I mention. I have not had them cruised, but from a conversation that I have had with the owners and timber men, it is heavily timbered with about the same class

of timber that there is in 6-6, and it can be purchased, or could be a short time ago, when I was talking with the owners at prices ranging from \$10 to \$15 per acre. If, after looking at the map, you think you would like to consider the purchase of this land that I have crossed in pencil, I will put myself in communication with the owners of it and submit prices to you a little later on.

Benson's logging railroad is now built from Clatskanie in 7-4 to a point in section 15, where I have marked with pencil. There is also a logging railroad operating from Goble up Goble Creek, also one from Columbia City running Westward. All these roads are headed for the Nehalem and will sooner or later reach the vicinity of your land, and it seems to me that land located like that and as well timbered as you say it is, is better property to have than what you own in 6-6. If there is any further information that you would like to have regarding this map, I will be pleased to furnish it upon request, excepting that I cannot give the amount of timber upon these lands, any more than their reports are that it is well timbered.

Yours truly,

E. Z. FERGUSON."

Q. Now, this deed that was executed, you say you had hard work getting your son to sign it?

A. Yes.

Q. And you say that you never had had a meeting of the board of directors?

A. Yes, sir.

Q. Is that true—about this land?

A. Yes, absolutely.

Q. You say you never had any meeting of the board of directors about this land?

A. No.

Q. Now, you are a truthful man, aren't you, Mr. Hewitt?

A. Yes, sir. Go ahead.

Q. You always tell the truth, don't you?

A. I try to. I make a mistake sometimes.

Q. Well, you wouldn't deliberately write an untruth, would you?

A. No, sir.

Q. Here is a letter of yours bearing date January 5, 1906, addressed to Mr. Ferguson, attached to your deposition—Plaintiffs' Exhibit A—"About the commission, the company some time ago passed resolutions to only allow 2½ commissions for sales of lands, of which I was not informed. Besides this, when I brought the matter up the directors all but myself were against selling, and would not have consented at all only to accommodate me."

A. Well?

Q. You wrote that, didn't you?

A. Yes, sir.

Q. Was it true?

A. Why, yes. But I went around and saw them all.

Q. Oh, well, you did see all the directors?

A. I went around and saw them about that.

Q. Then all the directors did consent to your making that deed?

A. No, I made a mistake. One of the directors was in New York, and I couldn't see him.

Q. Well, now, is that true? Is that what you meant by that?

A. I saw the ones that were there. That is what I meant. The directors—I saw all there.

Q. This is what you said: When you brought the matter to the attention of the directors, they were all opposed to it excepting you, and only consented to accommodate you.

A. Well, there were three there.

Q. What?

A. There were two or three, and the one in New York couldn't be there.

Q. Now, who was in New York?

A. Why, what is the last director there?

Q. Now, remember this was in 1905. What director was in New York at that time?

A. Well, the third one. I will tell you who I did see.

Q. Who were the directors at that time?

A. The directors that I saw was my wife and John and myself.

Q. Now, what other director was there at that time?

A. Well, there was Mrs. Norton, but she wasn't a director.

Q. Don't you know that there were only three directors at that time, sir?

A. I think there were five always.

Q. Will you swear that there were five directors at that time?

A. Yes. They held their office till their successors were appointed, as I understand it.

Q. Who were the stockholders at that time?

A. Why, there was Mrs. Norton—I can't remember them all.

Q. In 1905?

A. Yes. I can't remember them all.

Q. In January, 1906?

A. I can't tell you who they were, all of them. This stock is divided now with quite a number. I couldn't tell you how much. I owned about one-third of it, I think.

Q. Now, you owned what?

A. About one-third of it.

Q. You owned about one-third of it in 1905?

A. Yes, sir.

Q. Didn't you swear, sir, in your deposition, that you owned all of it at that time?

A. Well, I looked after it. It was in my name, and I looked it up, and—

Q. Will you answer my question? Didn't you swear in your deposition that you owned all of it except a share?

A. No.

Mr. YORK: I object to that. The deposition will show. This is an attempt to catch the witness. The witness intends to be fair. If there is any mistake, it is entitled to correction, but I don't want the witness to be put in an unfair position.

Mr. FULTON: I have a right to ask him if he didn't swear so and so.

A. I think I didn't swear such a thing. You are making it up.

COURT: The deposition has been taken some time, and it would be better if you would call his attention to what he said in the deposition, and let him see it.

Mr. FULTON: Mr. Ferguson, I wish you would go down to the office and get my copy of the deposition.

Q. Where is your stock book?

A. I don't know.

Q. What?

A. I don't know. I haven't seen it.

Q. Well, how do you tell who are the stockholders, or who were the stockholders at that time?

A. Well, we haven't looked them up for some time.

Q. Now, do you say you only owned one-third of the stock in January, 1905?

A. That is all.

Q. Who owned the rest of it?

A. My wife and John and Henry, and my daughter Mary, and Mrs. Norton.

Q. Now, how much did your wife own?

A. I don't know.

Q. How much did John own?

A. I don't know.

Q. How much did you own?

A. I looked mine up, and it left me about one-third. I signed it and put it in the safe, and they are signed and not transferred on the books.

Q. You signed it putting it over to your wife?

A. Yes. No—

Q. And John?

A. John and—

Q. Who is Mrs. Norton?

A. Mrs. Norton is the secretary of the St. Paul and Tacoma Lumber Company, and she is a widow, and her husband—

Q. I know, but what relation is she to you?

A. No relation to me. She is my wife's sister.

Q. She is your wife's sister?

A. Yes.

Q. Now how much did you sign over to her?

A. I didn't sign any over to her. This man has always had this stock.

Q. How much had he?

A. I don't know.

Q. Oh, yes, you know?

A. Well, I can tell you honestly I don't.

Q. You don't know?

A. No, sir.

Q. Haven't any idea?

A. I can guess within a thousand or so.

Q. How many shares are there altogether of that corporation?

A. I think that said there was 57,000, but I think there was more stock than that.

Q. You said there was 50,000, of which 37,000 was taken.

A. Yes.

Q. That is what you said in your letter?

A. Yes.

Q. Now, how many shares of stock were there of the corporation?

A. I didn't look it up. I think there is considerable

more than that. I know there is.

Q. Very well, how many are there, if you know?

A. The reason we are mixed up is that we haven't been taking care of it.

Q. What is the value of each share?

A. I don't know.

Q. Don't you know what the par value of each share is?

A. Oh, yes. \$1.00.

Q. One dollar?

A. Yes.

Q. Is it \$1.00 or \$100.00?

A. \$100.00.

Q. Well, that is what I thought. Each share is \$100.00 par value?

A. Yes.

Q. Then, if there is 50,000, it is 500 shares?

A. Yes, sir.

Q. If there is 37,000 of it taken, there are 370 shares, aren't there?

A. I think that the stock of the company was to be more than 50,000, but I don't think only 50,000 was paid in, but I don't remember. I cannot tell you.

Q. Your bill shows, and your record shows, it was incorporated for \$50,000, doesn't it?

A. I think—

Mr. YORK: They are the best evidence.

A. They are the best evidence.

Q. Sure, they are the best evidence, he says.

A. What is the use of bothering me, when I don't know?

Q. Do you want to be understood as swearing here that you don't know how much the capital stock of that corporation is.

A. He read it over two or three times. It is 50,000, I believe; and I was saying I think that—

Q. Your letter introduced here said that only 37,000 of it was taken. Was that correct?

A. We made assessments every time we bought any land; if we paid money, we made assessments to each one, and they paid it; and I didn't keep track of it, and that is the reason I don't know.

Q. In the course of these negotiations, Mr. Ferguson wrote and asked you what the amount of your capital stock was, didn't he?

A. Yes.

Q. And you wrote back and told him it was \$50,000, but only 37,000 had been taken, didn't you?

A. Well, that is, I heard you read that letter, but I wasn't sure—I guessed at it.

Q. You just guessed at it?

A. Yes.

Q. I see. You didn't think it was of sufficient importance to be accurate?

A. It was near enough.

Q. Let us get back to the proposition. That being the case, do you mean to say that you cannot tell the court anything near what Mrs. Norton had in stock?

A. No, I cannot. She has paid it all in small amounts for four or five years, while we were buying these lands—her and her husband.

Q. Who sold it to her—you?

A. No, she took stock—he was one of the original incorporators.

Q. She or her husband?

A. Her husband.

Q. He took ten shares, didn't he?

A. I don't know how much he did take.

Q. Don't you know that he took ten shares?

A. I know he has got more than ten shares now.

Q. He or she?

A. Well, I don't know whether the administrator or she has got it. I couldn't tell you that.

Q. But you don't know how much?

A. No.

COURT: Who is the secretary of this company?

A. My son John.

COURT: I thought maybe you were?

A. Oh, no.

Q. Your son John is secretary?

A. Yes. He has got full charge of it, and I haven't looked at it at all.

Q. You were the president?

A. I haven't never looked at it.

Q. Answer the question.

A. Yes.

Q. And your wife is a director?

A. Yes.

Q. You now swear that Mrs. Norton was a director in 1905?

A. No, I don't swear that.

Q. Who was?

A. I just told you that she was a stockholder.

Q. Very well; I am asking you who were the directors.

A. Well, Seeley—

Q. Do you say Seeley was a director in 1905 or 1906—January, 1906?

A. I don't know whether he went out at that time or not. I don't think he did. I don't remember when he went out.

Q. You had bought all his stock, hadn't you?

A. No, I bought the stock, and didn't make the transfer for a year and a half.

Q. Well, but you had it?

A. No, I didn't.

Q. It was your stock, wasn't it?

A. No, it was up in the bank, and he had it.

Q. You say you bought it?

A. Well, I hadn't paid for it, and so he kept it.

Q. When did you buy it?

A. I couldn't tell you that.

Q. You had bought it before January, 1906?

A. I had an agreement for it—he bought it—I will tell you now just how it is, if you want to know. He bought it from Mr. Lombard, and then when he bought it from Mr. Lombard, he took an agreement from me that when he wanted the money that I would pay him the money for that stock, and so it ran along for a year and a half or so before he came and demanded it, and then it ran nearly another year before I paid him the money.

COURT: But you got his stock?

A. No, I didn't get it till after I did pay him.

COURT: I mean, you got it finally?

A. Finally, yes. After this transaction, though, was entered into.

Q. Who are the directors or trustees now?

A. Why, I think there is only just the three. We haven't had the meetings on the plan of those that were elected.

Q. What three are there?

A. It is myself and John, and my wife, I think.

Q. Yourself, and your son John, and your wife?

A. Yes.

Q. How many shares of stock does your wife hold in the company?

A. I think I assigned to her 5,000 or something. I don't know.

Q. What?

A. It is assigned, and in my safe—assigned over to her 5,000 shares.

Q. These shares you indorsed to her?

A. Yes.

Q. But never have been delivered to her?

A. Well, part of them have.

Q. How many have been delivered to her?

A. I cannot tell you.

Q. How many have been delivered to your son?

A. Why, I think about—I don't know—four or five thousand; I don't know. I really don't know.

Q. Don't you know that—

A. I divided it all up, but—

Q. Don't you know that he never had but ten shares?

A. I couldn't tell you. I really couldn't tell you. I couldn't tell you, honestly. You see, the reason I don't

remember is because I assigned them over, and they are in the safe, and they have not been transferred.

Q. When you wrote this letter to Mr. Ferguson and told him you had had this matter of his commission up before the board of directors, you wanted him to believe that was the fact, didn't you?

A. I went and saw them, the three that was there.

Q. That stated the board of directors, didn't it?

A. Yes, sir, but I couldn't see those that were not there.

Q. Who were not there?

A. I considered until after Seeley delivered that stock that he was a director.

Q. You considered that he still remained a director?

A. Yes.

Q. He didn't have any stock?

A. Oh, yes, he did. He had it, I think, about a year after this transaction, before I got the money for him—before I paid him. He kept the stock until I paid him.

Q. You didn't consult Seeley?

A. No.

Q. But you consulted your wife and your son?

A. Yes, and Mrs. Norton.

Q. And Mrs. Norton?

A. Yes.

Q. Consulted all of them?

A. Yes. They had part of the stock.

Q. And they all agreed to the deed being made?

A. No, they didn't. They objected all the while.

Q. Well, but you said they did it to accommodate you; is that true or not?

A. John did.

Q. No, this is what you say in your letter—the rest of the directors agreed to it to accommodate you.

A. Well, there was nobody but John there.

Q. Well, then, you didn't tell the truth in that?

A. No, I made a mistake if I said that; because they didn't say so. Now, I am telling it just as I understand it.

Q. Well, now, in your deposition, taken at Tacoma in this case on the 31st day of January, 1912, I will ask you if you didn't testify as follows: "Q. Now, after the organization of the corporation Mr. Lombard sold his interest out to somebody here? A. Later on, yes, sir. Q. When was it he sold, do you remember? A. I do not know; I couldn't remember. Q. To whom did he sell? A. He sold some of the stock through Mr. King, to me, and as I remember, although I am not sure, then he sold the larger amount of the stock to Mr. Seeley. Q. What Seeley? A. Seeley the real estate man. "Now, then, have you any idea when that was? A. No. Q. How much did he sell to you? A. About one thousand dollars worth, through Mr. King. That would be ten shares."

A. That is a mistake right there. That was Mr. King was ten shares.

Q. This is what you said: "About one thousand dollars worth through Mr. King. That would be ten shares." That would be ten shares, wouldn't it?

A. Mr. King was ten shares, but Seeley was nearly one-third.

Q. The next question: "You held 490 shares to

start with? A. I presume so; about half the stock. Q. According to this record Henry Hewitt, Jr. 490, Lombard 490; A. N. Fitch, 5; and P. D. Norton 5, and Mr. King 10; at the organization meeting? A. I think that is right. Q. And Mr. Seeley purchased the remaining shares of Mr. Lombard? A. Yes."

A. I think that is right.

Q. "Q. Does he still own them? A. No, sir. Q. Who owns them now? A. I think I bought them of him. Q. When did you buy them? A. I couldn't tell you exactly, but two or three years ago. Q. Have you the record of their sale to you? A. I do not think so. Q. Haven't you anything to show when you purchased them? A. No. He got into trouble with his wife and came to me and sold them to me one day in a hurry; I bought them personally." Now, is that true?

A. Yes. But then he didn't turn them over to me.

Q. Well, he was in a very great hurry to sell them to you?

A. Well, he didn't turn them over to me.

Q. But he didn't turn them over to you for a year?

A. No.

Q. But you bought them at that time?

A. Yes. He had an agreement with me, as I told you, that I would buy them at par if he ever wanted the money. And then he demanded me to take them.

Q. When you drew up the deed, it read as a regular corporation deed, didn't it?

A. I don't think so. I think it was an over-and-under deed. What makes me think it was an over-and-under deed was because we always make that kind of a deed.

Q. Over-and-under, what do you mean?

A. We guarantee as far as all our actions are concerned.

Q. You mean to say it was not a general warranty?

A. No.

COURT: You mean a special warranty?

Mr. YORK: He means a special warranty deed.

Q. I am talking about regular corporation deed. You have a regular corporation deed for your corporation to execute, don't you?

A. No.

Q. What was this?

A. I don't think it was anything but just a deed that I told you.

Q. Don't you know what a corporation deed is?

A. No, not every one—every corporation gets a deed to suit themselves.

Q. This was executed in the name of the corporation, wasn't it?

A. Yes; oh, yes.

Q. And it recited that it was executed pursuant to resolution of its board of directors, didn't it?

A. I don't think so.

Q. You don't remember that?

A. Well, if it was, it was not true, because the directors didn't do it. I don't believe it was.

Q. Well, but you had consulted the directors?

A. Why, no, I hadn't consulted about this deed at all, I said; I just let John decide it. I told you I didn't consult the directors.

Q. You say that John signed it to accommodate you?

A. Yes,, he thought that Ferguson would fix that up, and then we could go before the directors and get them to sanction it.

Q. That is what he thought?

A. Yes.

Q. Why did you send it over to the bank, then, with instructions to deliver the deed to him on payment of the money?

A. Well, we thought it was all right. I knew well enough that if he did his part of the agreement, it would fix that deed right some way.

Q. What was his part of the agreement?

A. It was to get me these other lands.

Q. Where is there anything in any of the writings that said that?

A. There isn't anything in the writings. It was a verbal agreement. The writing is—he said he sent a map; I told him to hustle and get me the other lands.

Q. Now, you said Ferguson asked you to do something that you couldn't do. What was it he asked you to do?

A. He asked me to get this lady that—

Mr. YORK: Lockwood?

A. Lockwood, to sign another deed.

Q. Well, but you answered in your letter that you could get that done.

A. Well, but I didn't know how long—I didn't know where she was.

Q. Didn't you write him and tell him that her signature could be secured when she returned, and that you had a power of attorney?

A. Why, I told him that I understood we had, and that I thought her signature could be got when she got back.

Q. Do you mean to say Mr. Ferguson asked you to get her signature?

A. Yes, sir.

Q. In one of the letters to you?

A. I don't know. He came up three times.

Q. Now, didn't Mr. Ferguson write you in a letter, and simply ask you to get either the original power of attorney or a certified copy, and send it over and have it recorded? Isn't that all he asked you?

Mr. YORK: The letters will show.

A. The letters will show.

Q. He knows what the letter is.

A. He came up himself—

Q. What?

A. The letters will show.

Q. Don't you remember Mr. Ferguson writing you that?

A. Never got anything out of these letters, and he had to come up himself and have a verbal agreement to have anything done.

Q. Don't you remember Mr. Ferguson writing to you to get a certified copy of the power of attorney?

A. I don't remember that.

Q. Didn't he write you on January 3rd, "If, at the same time, you have an original power of attorney to Mr. Griggs from Harriett M. Lockwood, it could be sent over and recorded in this county. If you haven't the original, you can have a certified copy made from the

records there, which will answer the same purpose”?

A. He came up and we talked that.

Q. You remember of his writing that way, don't you?

A. I remember him writing me, yes.

Q. That was not impossible, was it?

A. Why, yes, I couldn't get Mrs. Lockwood.

Q. Couldn't you get a certified copy of that power of attorney?

A. I couldn't find it, and didn't find it.

Q. You didn't find it?

A. No.

Q. You swear you looked for that power of attorney? Did you go to the records and look?

A. No, I didn't.

Q. You know it is on record there, don't you?

A. No, I didn't know that.

Q. Don't you?

A. I went to Mr. Griggs, and he thought it was, and that is all I know.

Q. You didn't go over there to look to see whether it was or not?

A. No. I didn't care, because the trade was off.

Q. Then that wasn't one of the grounds, was it? That wasn't the impossible thing he asked you to do, was it? You say he asked you to do things that were impossible. I want you to tell what it was.

A. One was to get this Lockwood; and he said we couldn't give a deed unless we paid the state.

Q. You could pay the state, couldn't you?

A. I didn't want to.

Q. Did he make that a condition?

A. They were all conditions when he ordered the deed back.

Q. They were all conditions when he ordered the deed back?

A. He put up his money upon condition.

Q. Didn't he write you that, so far as conforming with the laws of Oregon was concerned, it was not necessary; that they would not insist on that?

A. Well, he thought probably afterwards, when he come up and found this thing on record himself, he thought we could get along.

Q. Didn't he, as early as the 3rd day of January, write you as follows: "In regard to the Hewitt Investment Company's having failed to comply with the Oregon Laws governing foreign corporations, we will not let this delay the deal"?

A. He came back home, after he had talked to me up at Tacoma, and cooked that letter up, I suppose to make it stick.

Q. Now, you are willing to testify to that, are you?

A. Yes, that is just what I think he did.

Q. When was that deed sent back from the bank?

A. I cannot tell you. The records will show.

Q. The records will fortunately show just when that was sent back from the bank. Now, on December 22nd you sent the deed, didn't you?

A. I don't know, I tell you. I can't tell you the date.

Q. Well, look at that. That is your signature, isn't it?

A. Yes, that is my signature.

Q. Well, that bears date December 22nd. Now, on January 5, 1906, you wrote to the Astoria National Bank, saying, "The Hewitt Investment Company or Henry Hewitt sent you some time ago deeds to deliver to E. Z. Ferguson on payment of \$12,800. I think the deeds it seems are faulty, and Mr. Ferguson wants them changed. You will please return them, and oblige." Now that was on the 5th of January, so the deeds had not been returned at that time, had they?

A. Evidently not.

Q. You wrote for them on the 5th of January. Well, now, this was on the 3rd of January that Mr. Ferguson wrote you as follows: "In regard to the Hewitt Investment Company's having failed to comply with the Oregon laws governing foreign corporations, we will not let this delay the deal." Then he hadn't put up any job there, had he?

A. They probably crossed. He wrote that down here, and it didn't get there, and I was away probably and didn't get it, or I wouldn't have written that.

Q. It so happens, Mr. Hewitt, and I call your attention to this fact, that this letter of January 3rd, in which he makes this statement, says: "This morning I wrote to the Hewitt Investment Company, which letter you will undoubtedly receive about the same time that you receive this, and at noon today, I received your letter of the 2nd, to which I hasten to reply." Now, this letter to the Hewitt Investment Company bears date the same as this, namely, January 3rd—Astoria, Oregon, January 3rd. "On December 26th I wrote you in regard to the title of your land which I am purchasing, stating

that there was lacking in the title, a power of attorney from Harriet M. Lockwood," etc. Now, it was in response to his letter of January 3rd that you wrote your letter of January 5th to the bank to send the deeds back, wasn't it?

A. I don't think so.

Q. How long does it take a letter to go from Astoria to Tacoma?

A. It takes four or five days very often.

Q. From Astoria to Tacoma?

A. Yes. They come up here, and they lay in this postoffice, and then they go somewhere else, and sometimes it is all kinds of time.

Q. If they go in regular course of mail, they will get there in 24 hours, won't they?

A. Half the time I am not there.

Q. I am supposing you are there. You know what is due course of mail? It comes up from Astoria on the railroad to Goble, and crosses there at Goble?

A. No, it comes clear to Portland, as I understand.

Q. Well, if it comes clear to Portland, it goes out of its way, doesn't it?

A. Yes.

Q. If it goes in due course of mail, it goes in 24 hours, doesn't it?

A. No.

Q. You will observe that Mr. Ferguson in writing to you says, on the 3rd of January: "This morning I wrote to the Hewitt Investment Company"—that is, January 3rd—"which letter you will undoubtedly receive about the same time that you receive this, and at

noon today,"—no, that is so, I was wrong in the inference. There is a comma there. No, he doesn't say that you would receive it at noon.

A. No.

Q. But you ought to receive a letter in 24 hours, oughtn't you?

A. I don't think—it comes up here and then it goes back.

COURT: Do you know it comes to Portland?

A. Well, I understand it does. I wouldn't swear to it, Judge. That is the way I understand it.

COURT: It is out of the usual course, if it does.

Q. You know, as a matter of fact, Mr. Hewitt, if a letter came to Portland, it would come up either on the night train or on the morning train. If it was written on the 5th, it would come up on the night train to Portland, wouldn't it? It would arrive here at Portland, and go to Tacoma the next day, wouldn't it?

A. Well, I am nearly positive that I hadn't got that letter, because I would have wrote different if I had.

Q. Wouldn't it?

A. I think they passed in the mail. That is what I think—if I want to guess at it.

COURT: I don't know what the course of mail is, but I supposed that mail was distributed on the cars, and that the Washington mail, especially for Tacoma and Seattle, went through.

A. The train all comes around here now, Judge.

COURT: Would go by Goble. The mail is distributed on mail cars.

Mr. FULTON: Undoubtedly. But it wouldn't make

very much difference whether it was or not. It couldn't be over 24 hours, in any event. It couldn't possibly be.

A. I have been there lots of times, and saw them.

Mr. YORK: I don't want to object to this, if the court please, but it seems to me it is getting into an argument and wrangle on an immaterial matter, loading up the record here unnecessarily. I just object to it on that ground merely.

COURT: I don't think it is very material, but it is a matter of information that I was not aware of. I supposed the mail from Astoria would be distributed on the cars, and would probably go to Tacoma without coming to Portland.

A. Judge, I wouldn't swear to it, but I am nearly positive that it didn't.

Q. You don't pretend to say, in any of these letters, you have any letter from Mr. Ferguson in which he undertook, or made it part of the bargain or contract for the purchase of this land, that he was to get you other land?

A. His letters there that you have got here in evidence says that he will send me a map, and he will look up the lands. My letters to him says, Hustle up and get those lands.

Q. You are basing your statement, then, on what those letters say, are you?

A. I am basing my statement on what he promised to do verbally, if I got this deed for him.

Q. You mean to say he promised it in these letters just as much as any way?

A. No, his main promise was up there, when he

agreed if I would try to get that deed he would get me these other alnds.

Q. Are these letters that he wrote in regard to getting these other lands all in line with his conversation with you?

A. No, it ain't. He tried to get around it in the letters.

Q. There wasn't any occasion for him getting around it in the letters if he was opening negotiations?

A. Yes; he was getting my lands for about half what they were worth, and he was going to get me these other lands for less; and he was trying to have me fix the deeds up, and then I would never get his lands.

Q. The fact is the prices of your lands went up considerably after you entered into this bargain?

A. No, they didn't. In some of these letters I wrote him that the lands were worth \$30,000.

Q. Yes, I know, but you also told him you had the matter up before the board of directors?

A. Well, now, I have told you about the board of directors, and you keep harping over that. If you got me to testify there like your freak law here, you get me to say something that is not true.

COURT: That won't do. You answer his question.

Mr. YORK: Just answer the question. That is all.

A. I apologize.

Q. You say you told Mr. Ferguson that you had no authority to sell the lands?

A. Yes, sir, time and again.

Q. When did you tell him that?

A. Every time I talked to him.

Q. Why did you tell him that?

A. Because he knew well enough I couldn't sell it without getting my board together.

Q. You told him all that, did you?

A. Yes, sir, time and again.

Q. And yet he didn't care anything about the board getting together?

A. Oh, he thought I would get it through some way.

Q. What?

A. He thought I would get it fixed up for him some way.

Q. If you told him you couldn't do it without getting the board of directors together, why didn't you get them together before you sent the deed?

A. Why didn't I do a whole lot of things? When a man has a thousand things to do, he neglects some things.

Q. You say you kept telling Mr. Ferguson all the time that you could not sell the lands without getting your board of directors together?

A. Yes, well, I didn't sell them. We never did sell them. He never had no title.

COURT: Just answer his question, Mr. Hewitt.

Q. Why were you telling him that, is what I want to know? Why did you tell him that?

A. Because I thought if he would produce his lands that I could get the board to fix it.

Q. That is not an answer to the question.

A. That is the reason.

Q. You say you kept telling Mr. Ferguson continuously that you couldn't sell these lands, that you had

no authority to do so?

A. Yes, sir.

Q. Without getting your board of directors together?

A. Yes, sir.

Q. Why did you make that statement to him?

A. Because it is true.

Q. Well, but what was your motive and purpose in making the statement.

A. Well, because it was true, I couldn't do it.

Q. Well, didn't you intend to get them together?

A. No, not till he—I didn't think there was any need of it, and part of them were not there, till he delivered his lands.

Q. You didn't think there was any need of it?

A. No.

Q. And yet you told him that you couldn't make the sale without doing it?

A. Yes. It wasn't no legal sale.

Q. You didn't think it was a legal sale?

A. No legal agreement that I made.

Q. You thought when you sent down this deed to the bank with instructions to turn it over to Mr. Ferguson when the \$12,800 was paid, you thought you were giving him an illegal deed, did you?

A. No, I didn't. I thought that he would get this land and give me the other, and then I could go to the directors and get them to fix it up.

Q. But if he didn't do that, if he didn't get these other lands, why, you would have his money and he would not have a deed that was worth anything? Was

that your idea?

A. We haven't got anybody up there that keeps that—

Q. Was that your idea?

A. No, sir.

Q. If he didn't get you these other lands, you intended to go back on it, did you?

A. Yes.

Q. If he didn't get the lands, you intended to go back on it even if you did have the money, didn't you?

A. Oh, no, couldn't do it.

Q. Then, when you sent down instructions to the bank to turn over that deed upon payment of \$12,800 by Mr. Ferguson, to him—

A. I was addressing—

Q. Now, wait. If it had been done, if the bank had turned over the deed and you had got your \$12,800, the matter would have been closed entirely, and you would have had no claim for these other lands, would you?

A. Yes, I would have immediately sued Mr. Ferguson to produce his lands.

Q. You would have sued him?

A. Yes, sir.

Q. You keep saying here all the time that you cannot sue where there is not any written contract—

Mr. YORK: You are getting into argument with the witness.

COURT: That is a legal question.

A. I am glad you called him down once.

Q. You mean to say that you had that in your mind that you would sue him?

A. Yes, sir.

Q. At the time you sent this deed down?

A. I had it in my mind that I didn't have any real idea at all but what he would do what he agreed to and get us the lands. I told my son so. I believed he would get the lands there, and I trusted him with that.

Mr. YORK: You believed that at that time, did you?

A. Yes, sir.

Redirect Examination.

Q. Mr. Hewitt, in view of the cross-examination, just state whether it was your intention to have the execution and delivery of this deed ratified by the Hewitt Investment Company.

A. It was, if I got the other land.

Q. And that was not done because why?

A. Because they would not agree to it when they didn't get the land.

Q. Because he failed or refused to deliver the other property?

A. Yes.

Q. Now, then, was there any subsequent meeting of the corporation ratifying that transaction?

A. No, sir.

Q. I will ask you whether this record book here contains a record of all of the meetings of the Hewitt Investment Company that were held?

A. Yes, sir; excepting where I went and saw the directors.

Q. Well, I am talking about regular meetings of the

corporation.

A. Yes, sir.

Q. Of the trustees or stockholders?

A. Yes, sir.

Q. I don't want to ask a leading question, but it would save time if they won't object to it on that ground—I was going to ask this question: Was it not a fact that this was handled by you as a personal transaction for the purpose of turning it in to the company, and then having it ratified by the company afterwards?

Mr. FULTON: Objected to.

Mr. YORK: I admit it is a leading question, but I don't know how to frame it otherwise.

COURT: You may ask the question.

Q. How was this transaction handled by you—as a personal matter, or as a company matter, up to the time of the delivery of the deed?

A. It was handled all the time as a personal matter with me. Mr. Ferguson, it was a personal matter with him, and it was a personal matter with me; and I agreed to try to get it.

Q. With what intention on your part with reference to the company afterwards?

A. It was my intention to get it ratified when he got his lands or did what he agreed to; and I should have done it anyway, because I believed he would do it.

Q. State whether or not you were acting in good faith absolutely in that transaction at that time.

A. Yes, sir, acting in good faith.

COURT: Mr. Hewitt, what was the custom of the company in giving deeds of land when they sold lands,

as to adopting a resolution.

A. Judge, that company, you see we never deeded any land ,and didn't have any custom. We didn't do anything. All we did was to buy lands.

Mr. YORK: I might say, if your honor please, that there is some testimony on that point in the depositions, which your Honor will find when you come to read it.

A. You see we didn't have any custom. We never did deed any lands.

COURT: I suppose that is gone into?

Mr. YORK: That was gone into upon the depositions.

(Excused.)

Mr. YORK: There is just one other matter. I want to just testify to one matter myself. I understand there is some rule on which it will affect the argument in the case.

COURT: The court will permit you to do that.

E. R. YORK, sworn as a witness on behalf of defendant, testified as follows:

I desire to state that for several years last past, and prior to and since this transaction, I have been the attorney for Mr. Hewitt, personally, and several of his corporations—the corporations in which he is interested. And referring to the record book of the corporation—secretary's record book—I wish to say, in referring to the purported record of a meeting of the stockholders on May 29, 1909, that appears on pages 42 and 43, and the meeting of trustees on May 29, 1909, appearing on pages 44 and 45 of the record book, which records are not signed by any officer of the company, that those minutes

were prepared by me at the request of John Hewitt, as near as I can recall, on about that date, he stating to me that the company intended to hold meetings of the stockholders and trustees, at which they proposed to take some corporate action, and indicating certain action of the corporation which he desired me to embody in the minutes of the stockholders and trustees; and pursuant to his request I prepared those purported minutes of the meetings of the stockholders and trustees dated May 29, 1909, which now appear to have been pasted in the record book, but are unsigned. But those minutes are not prepared pursuant to any meeting actually held of either the trustees or stockholders, to my knowledge, and I was not present at any meeting when such corporate action was taken. I make this explanation as explanatory of certain testimony appearing in the depositions.

Cross Examination.

Questions by Mr. FULTON:

Mr. York, were you an officer of the corporation?

A. I was not.

Q. Nor a stockholder in it?

A. Nor a stockholder. I had no capacity except as an attorney.

Q. So meetings might be held without you?

A. They might have been held without my knowledge. But I desire to state they are not pursuant to any meeting at which I was present, and, so far as I had knowledge, the action recited in those minutes was not taken, but those were only drawn up as proposed minutes of proposed meetings.

(Excused.)

TESTIMONY IN REBUTTAL.

E. Z. FERGUSON, recalled on behalf of plaintiffs testified as follows:

I heard the testimony of Mr. Hewitt when he stated he told me he didn't have power to make the sale of the land, but he never made that statement. He told me in the early part that one of the stockholders of the company named Lombard lived in the east, but when we made an agreement where I was to get the land I asked Mr. Hewitt about getting a meeting of the directors, and he said "Oh, the whole thing is with me. Whatever I say goes." And I said "Well, you will have to communicate with that party in the east" and he said, "No, he is out of it. The whole of the stock is owned right here by myself and my son," and he may possibly have said his wife; it was all in the family. The deed was on a regular corporation form and was regular in all respects with the exception of the error in description. In examining the deed, we were all quite satisfied that it was a deed made with copying ink and that a press copy had been taken of it. It bore that appearance and we were all satisfied that that had been the case. Regarding the valuation of those lands, we bought something like seven or eight thousand acres and at that time we had not paid anybody over \$15 an acre. Nearly all was bought for less than \$12.50 and some as low as \$1000 a claim, within a few months preceding, and the price offered Mr. Hewitt was considerably in excess of anything else we had paid in that neighborhood. I know timber through the Nehalem Valley was rated along those lines at that time but it raised after that quite rap-

idly and was raising all the time in 1906 and 1907. Timber went up very rapid during 1906. I bought and sold a great deal of timber in that vicinity. I bought five claims for \$5,000 and sold those five claims before the fall of 1907 for five times that. Timber went up very rapidly after this deal was made, but at the time we purchased this land, \$20 an acre was an extra high price for it.

Cross Examination.

The price of this land had advanced considerably before this suit was begun. The timber, today, on those four claims involved in this suit would be worth anyhow \$40,000, possibly more.

After argument of the case by counsel the witness E. Z. Ferguson was recalled by plaintiffs and testified:

I think I requested Mr. Hewitt to send the deed to the Astoria National Bank. This request was made when I was in Tacoma at the time we made the bargain for the lands; he said he would have it fixed up and have a meeting of the board of directors and he told me he was the whole thing; that he and his son owned all the stock. I told him the abstracts would have to be made and if we found the title was all right we would pay the money.

Cross Examination.

I don't know as there was any special agreement as to the conditions under which the money was to be paid into the bank. Mr. Hewitt was to send the deed over, we would have the abstract of title made, and when the

title was perfect we would pay the money and take the deed.

DEPOSITION OF HENRY HEWITT JR.

HENRY HEWITT Jr., called as a witness on behalf of plaintiffs, testified as follows:

Direct Examination.

My name is Henry Hewitt Jr.; I reside in Tacoma, age 71. Was president of the Hewitt Investment Company, defendant in this suit, in 1905 and 1906, and am still president. I had some correspondence with E. Z. Ferguson in 1905 and 1906, relative to the sale of the lands involved in this suit, but we made the trade verbally in Tacoma, some time before the deed was made. Under the agreement I made, I was to trade and procure a deed and send to the bank in Oregon. I refer to the deed sent to the Astoria National Bank, conveying to Ferguson these lands. I got the deed back, but do not know where it is now, it was destroyed, I think. I have not seen it for four or five years. I destroyed it, or threw it away, or something; I did not deliver it to anybody.

This letter handed me, dated June 5th, 1906, signed by Henry Hewitt Jr., is in my handwriting, signed by me; it was written in regard to the general trade and sale and agreement I had with him, in regard to the lands in controversy and other lands.

Plaintiffs offered the letter in evidence.

Defendant objected, on the ground that it is incompetent, irrelevant and immaterial, and is a letter written

subsequent to the alleged agreement of sale, and subsequent to the withdrawal of the proposition of sale, and after all matters connected with the proposed sale had been withdrawn.

Letter marked "Plaintiffs' Exhibit A."

In 1905 and 1906 the Hewitt Investment Company was constituted of myself, my son, Mr. Norton, and a man from Boston, I do not recall his name. The capital stock of the corporation was \$50,000, divided into 100 shares. Up to about that time myself and my son and Mrs. Norton owned about half. Mrs. Norton lives in Tacoma; Mr. Norton married my wife's sister. The other half was owned by a man in Boston, and he sold his half to a real estate man in Tacoma. We traded together, he owned half and I was to have half. The resident directors or trustees of the corporation were my wife, my son John and myself, and I am not sure but one of the representatives of the Boston man was too. There were 3 or 5 trustees, I would not be sure which. When this matter of making this deal with Ferguson came up, we had no meeting of the trustees, and did not discuss it with them; my son did not know anything about it, he was not here at the time; he was living with me at my house. My son John, who was a director, was also secretary of the corporation. The Boston man's name was Lombard. This book produced is the Secretary's record book. This book shows that the first meeting of the stockholders of the company was held in November, 1890. I think the corporation was organized about that time. There have been some meetings of the directors held; we do not hold them

probably as we ought to every month, or every year; sometimes we ran over a year. The corporation was engaged in business only in buying those lands in Oregon and some in Washington. This letter handed to me, dated December 22nd, 1905, signed Henry Hewitt, Jr., is in my writing. In this letter is stated: "We have today sent deed for lands to Astoria National Bank which they will deliver to you on payment of \$12,800. I will send you a check for commissions when the money is received, of two and one-half per cent. Our directors would not allow more, and in fact did not like to deed the land at all." That was true, and more than true. They did not meet at all. I just talked to some of them and they kicked about giving the deed at all. I did not meet any of them, only myself and John.

Q. What did you mean by saying that your directors would not allow more than 2½ per cent?

A. I just made it up; I said that; it was not brought before them at all.

Q. You had not talked with them at all?

A. No.

Q. You had talked with your son John, hadn't you?

A. Not about the commission. No, I don't think I did at all. I had not talked with my son John about the sale of the land to Mr. Ferguson; I did afterwards get him by persuasion to sign the deed, on the ground that Ferguson was going to deed some other lands to us adjoining our other lands. He did join as Secretary in executing the deed by persuasion. I do not think the deed stated it was executed pursuant to a resolution of the board of directors; if it did say so, it was not true. We

have tried to find the deed. I presume the deed was executed under the corporate seal of the Company, which has a corporate seal.

Plaintiffs offered in evidence the letter of December 22, 1905, identified by the witness.

Defendant objected that it is incompetent, irrelevant and immaterial, to prove any issue in this cause, and does not constitute such a writing as will support this action.

Letter marked "Plaintiffs' Exhibit B," and attached to deposition.

The letter was written by me personally, and not by the Company. I did not assume to be the company. I was acting in good faith, if Ferguson had carried out his agreement I would have procured the agreement, right or wrong, from my people. I did procure the deed, but I did it wrongfully and ought not to have done it. I presume I sent the letter with the deed to the Astoria National Bank, but do not remember the date.

Plaintiffs offered in evidence a copy of a letter dated December 22, 1905, to the Astoria National Bank, signed Henry Hewitt Jr.

Defendant objected to the copy of letter offered, that it is not the original letter, the original is not accounted for, or its loss or destruction shown, and it is incompetent, irrelevant and immaterial, and the original letter is the best evidence.

Letter marked "Plaintiffs' Exhibit C," and attached to deposition.

Mr. Ferguson and I had considerable correspondence in 1905 and 1906 relative to this transaction.

Plaintiff offered in evidence a copy of a letter as follows:

“September 25th, 1905.

“Hewitt Investment Company, Tacoma, Washington,

Gentlemen: Your letter of recent date stating that you would not care to trade your lands, but that you would sell them all for twenty dollars per acre, received, but in reply I have to say that there seems to be a very poor prospect of making a sale of this tract at the present time. Timber buying has dropped off, and there is practically no timber changing hands. It may be better after a while. I am authorized to offer you \$8,000 for the four claims in 6-6. As you know one of these claims is partially burned. One of them is better than the average, and the other two are just about up to the average, in that part of the country, and the price offered you is more than has been paid anyone else in the township. The timber is mostly red and bastard fir, practically no yellow fir.

Yours Truly, E. Z. FERGUSON.”

Defendant objected to the letter going into the record, and as evidence in the case, on the ground that it is not the basis of the alleged sale, and the original letter, if such letter was written, is the best evidence, and it is incompetent, irrelevant and immaterial.

The Witness: I may have received the letter, I remember receiving letters, but the whole letter is a lie on the face of it, because the timber was worth four times what he claimed there. No meetings of the stockholders or trustees of the Company were held between May 30, 1903 and May 29, 1909. The stockholders meeting dat-

ed May 29, 1909 was not held, and the resolution shown in the minutes on page 42 was never adopted. If we had a meeting, the signature of the officers would be there, and these minutes are not signed. We had not been selling real estate, except a few small sales; we made a few sales in Washington, but none in Oregon; I could not tell when. I presume our attorney's attention was called to some sales, and he thought we ought to have some such resolution, but we never had such a meeting. The sales made were by deed executed in the name of the corporation, by myself as President and my son as Secretary. I think some small sales were negotiated by Mr. Seeley, who was a director, representing Mr. Lombard, who owned half of the property. My son, J. J. Hewitt, was Secretary of the Company on June 1st, 1903, and no meeting of the trustees was held after that date. No sales were made after June 1st, 1903, except some small sales; I can not recall any tracts sold in Washington after June 1st, 1903; I think the resolution proposed to ratify something sold previously without any meeting of the trustees being held. We really have unsold all those lands belonging to the Company, we did not convey any of any consequence. The Company owns five or six thousand acres, bought at different times, including the lands in Oregon. I think I was authorized by Lombard to buy any lands, and I submitted them to him, and if I got his favorable report I bought them. I think we held formal meetings on most of them. Mr. King and Mr. Seeley, kept track of that, they were Lombard's representatives. The lands were really bought by the others, and we got together and

recognized it. Mr. King bought a good share of the land. We bought these lands in 1890 and 3 or 4 year after that. The by-laws in the front of the record book are the by-laws of the Company. I have been president of the Company since its organization. We had a finance committee; Mr. King and myself did the financing for a long while, and he kept track of the lands. I bought any land which I thought I wanted to buy. I brought it up to Lombard's man, and the secretary and treasurer, and if we agreed upon the land, all right, and any that they did not want I kept myself. I always bought it in my own name, and did the transactions in the name of Henry Hewitt Jr., and not for the company. I think most of the lands were bought in my name, and then afterwards deeded to the company by consent and agreement, in case the company or committee approved.

Mr. FULTON: Q. Now after the organization of the corporation Mr. Lombard sold his interest out to somebody here?

A. Later on, yes, sir.

Q. When was it he sold, do you remember?

A. I do not know; I couldn't remember.

Q. To whom did he sell?

A. He sold some of the stock through Mr. King, to me, and as I remember, although I am not sure, then he sold the larger amount of the stock to Mr. Seeley.

Q. What Seeley?

A. Seeley the real estate man.

Q. Now then, have you any idea when that was?

A. No.

Q. How much did he sell to you?

A. About one thousand dollars worth, through Mr. King. That would be ten shares.

Q. You held 490 shares to start with?

A. I presume so; about half the stock.

Q. According to this record Henry Hewitt, Jr., 490, Lombard 490; A. N. Fitch, 5; and P. D. Norton 5, and Mr. King 10; at the organization meeting?

A. I think that is right.

Q. You afterwards purchased ten shares?

A. Yes, sir.

Q. And Mr. Seeley purchased the remaining shares of Mr. Lombard?

A. Yes.

Q. Does he still own them?

A. No, sir.

Q. Who owns them now?

A. I think I bought them of him.

Q. When did you buy them?

A. I couldn't tell you exactly, but two or three years ago.

Q. Have you the record of their sale to you?

A. I do not think so.

Q. Haven't you anything to show when you purchased them?

A. No. He got into trouble with his wife and came to me and sold them to me one day in a hurry; I bought them personally.

Q. So that made you the owner of practically all the shares of stock?

A. Oh, no.

Q. Who else owned any?

A. Mr. King owned his for awhile and Mr. Norton owned all of his, and had more than at first.

Q. Mr. King had ten and Norton five?

A. I think we issued more shares after that.

Q. Well this seems to make one thousand shares altogether?

A. We never put in but about fifty shares, and when we bought land we assessed, and the stock was issued.

Q. But at the first meeting you had 490 and Lombard 490.

A. Yes.

Q. And the others five and five and ten respectively, but subsequently Mr. Lombard sold to Mr. Seeley, and Mr. Seeley sold to you?

A. Yes, sir; I don't think we issued the others.

Q. But to start out with you and Lombard had equal shares?

A. Yes, sir.

Q. And you succeeded through sales to the interest of Lombard?

A. To all but ten shares I think.

Q. So that gave you practically all of the stock?

A. It was a pretty good strong majority.

Q. You got all of Mr. Lombard's excepting ten, and that would leave Mr. Fitch five, Norton five and King ten, and ten others, which would be thirty shares outstanding that you did not own, and all the rest you owned?

A. No, I sold to my wife and took some of her property, and I sold to my son John. I don't own it all. I don't know just how it stands.

Cross Examination.

No meeting was held on May 29th, 1909, by either the stockholders or trustees; no such resolution as shown in the minutes of that date was discussed or agreed upon by the stockholders or trustees to be adopted; it was only a proposition to hold a meeting and take action, which was never done. The Hewitt Investment Company was merely a holding company for timber lands, it has not done any business of buying or selling lands generally; it now holds practically all the lands which it has had. I bought the lands myself in my name, and if the finance committee agreed to it they took over any lands they wanted, we agreed upon the price, and I deeded to the company, and any that they did not want I kept myself. Before the lands were taken or transferred to the company, they were approved by the finance committee or the officers and trustees of the company. The proposition of the sale of the lands involved in this suit was not submitted to the stockholders or trustees of the company; the trustees never took any action authorizing the sale; they knew nothing about it, except John, and I induced him to deed them by saying to him that Ferguson was going to deed me a great lot of other lands, of which he sent me a map, at fifty cents a thousand. It was a personal transaction between me and Ferguson. I proposed to take the lands, and deed them to the company in lieu of these lands. Ferguson furnished me a map, and told me to write the parties, and that he would see that I got the title. We wrote to the parties and tried to buy the lands, and they asked me twice what was agreed upon, and some of them three times. The whole in-

ducement to me to go into the transaction was not to sell the lands, but to buy lands adjoining other lands I had in Oregon; it was a trade to accommodate him and to accommodate me; it was with him personally; it was in the nature of a trade by which he was to purchase other lands at a fixed price; he was to take this same money and pay for the other lands. He did not do it; he told me he would, and fraudulently got me to sign the deed. The inducement to sign the deed was that he was going to give me more lands, about 300 or 400 acres or more, at fifty cents a thousand, adjoining other lands I had there. No consideration has been received by the Hewitt Investment Company for the deed sent to Astoria, or for the sale of the lands involved in this suit; no part of the proposed purchase price was paid to that company or to me personally. There was merely a verbal agreement of understanding between me and Ferguson regarding the proposed sale of the lands involved in this suit; I was then dealing with Ferguson as an individual; I had no dealings with the plaintiff, Minnesota & Oregon Land & Timber Company, nor any agreement with it for the sale of the lands, and Ferguson did not represent that he was dealing on behalf of that corporation. None of the money paid in to the Bank at Astoria by Ferguson was ever received by me or the Hewitt Investment Company; the bank never offered to pay over to me any of that money; it held the money because they claimed the deed was wrong and the Company had no legal right to sell any lands in Oregon, and the title was not good or satisfactory; Ferguson was up in Tacoma fixing up the title and claimed he would get me the other

lands he agreed to, but I never got them. The money paid to the Astoria bank was on the condition that it was to be paid over upon the showing that the title was perfect and to the satisfaction of Ferguson; the title was not then perfect and was not made perfect. The objections to the title were that Mr. Griggs did not have a power of attorney of record, and that we had no legal title to sell without filing our corporation articles in Oregon, and that Lockwood had not given any power of attorney; those objections were never corrected; we tried to correct part of them, but never organized in Oregon or filed records there. The money paid in to the Astoria bank was payable to the Hewitt Investment Company only on condition that the objections to the title were removed. I know the deed to Ferguson was not executed by authority of the Board of Trustees.

Re-direct Examination.

Ferguson wrote to me and talked to me in Tacoma that the lands he was to purchase and trade to me were selling for thirty cents and estimated so and so, and the fact was that they were not selling at that price and those estimates were twice what he said. He fraudulently represented that land was worth only thirty cents, and that he could buy the land for that. I remember his writing me what timber was worth, and his making me an offer of \$8,000. He came up himself and induced me to have the deed executed, and he was going to get me the other land, and he never did, but wanted my deed, and never got the other land. It was a verbal agreement between him and me personally.

Re-cross Examination.

The lands Ferguson agreed to deliver to me, he was unable to procure and deliver in accordance with his agreement; they asked a dollar and a dollar and a half a thousand, instead of fifty cents. He sent a map of them which I tried to find, but could not. The agreement between myself and Ferguson was entirely oral, and whatever his letters might claim or my own might. Neither Ferguson or any one on his behalf prior to this suit offered to pay to me or the Hewitt Investment Company the consideration of \$12,800 free of conditions; the conditions he asked were never performed, part of them we could not fulfill. I have been interested in the purchase and sale of timber lands in Washington and Oregon since 1888; I have had many transactions in billions of timber all told. I bought the lands involved in this suit, and those lands at the time of the transaction with Mr. Ferguson were worth \$25,000. The inducement to me to make this sale or exchange with Ferguson was that I had another lot of land near Nehalem, where the railroads were near, and if I could make an exchange they were more available for me than the lands he wanted. Ferguson was supposed to know the value of the lands he was to procure, and from what he said they would be better for me than those, and he would get me twice as much of them, but he carried out his agreement in no respect whatever. I called on Ferguson to keep his agreement, and he failed to do so. The \$12,800 paid in to the Astoria National Bank was not held or retained by the bank as my agent, and I never received any money from that bank. The reports made to me regarding

the money paid in to the bank were made by one of my cruisers who was down there talking to them, and the balance of it was by letter ; I never met them. The money was held subject to conditions which I could not perform if I wanted to, and none of us have ever procured the title that they demanded or performed the conditions as to the title. The Hewitt Investment Company has paid the taxes on these lands for the year 1905 and since then to date.

Re-direct Examination.

The conditions imposed on us which we could not fulfill were to get a power of attorney from Mr. Griggs, and to get a deed from Lockwood, and to file our articles of incorporation in Oregon ; they were not waived ; the matter of filing articles or conforming to the law as to foreign corporations was not waived until after everything was cancelled and withdrawn, as I remember. I called on Ferguson to keep his agreement, both by letter and verbally when he was in Tacoma some months after that. We wrote to the bank and asked them to send the deed back ; I thought Ferguson was going to be in Tacoma and would fix up the land matter ; at that time I expected to have the deed corrected, if he did his part of it and was coming up to Tacoma to do it. Any waiver by Ferguson of the conditions as to the title was made after the deed had been returned and we ascertained he could not deliver the lands ; I am positive of that, but I don't think he waived anything, because he came up and wrote after the deed was returned and this talk was afterwards.

DEPOSITION OF J. J. HEWITT.

J. J. HEWITT, called as a witness on behalf of plaintiffs, testified as follows:

Direct Examination.

I reside in Tacoma, Washington; age 37; am a son of Henry Hewitt Jr. Some of the stock of the Hewitt Investment Company is in my name and is my own, I could not tell how much. There are probably 5 or 6 stockholders in the Company; they are Henry Hewitt Jr., Rocena L. Hewitt, his wife, myself, the estate of P. D. Norton, and Mr. Seeley. I think the estate of Norton has 2 or 3 shares; I think Seeley had about \$10,000, he sold out to my father, Henry Hewitt Jr. several years ago, guessing at it I would say about 4 or 5 years ago. I am secretary of the company, and have been secretary since the former secretary resigned. Since I became secretary I continued such to the present time, but we have never had anything to do in connection with the Company except to pay the taxes once a year. The company runs itself, it is a holding company, we never sold anything. I believe we did sell some land in King County but the taxes and everything have been paid by assessments; it is just a holding company. The only sale I remember was forty acres in King County. My father gave me the shares I have, I presume he put them in my name so I could hold the position of secretary. I remember signing a deed of lands to Ferguson, I don't remember when, and hardly remember the transaction at all; according to the by laws the secretary is supposed to sign. In a matter of policy whether a thing should be sold or not, my father always brought me in and asked

me what I thought about those things. When I came home from some trip after 2 or 3 months, he said here is a deed to be signed, and I said I didn't know anything about it. He said he had made some deal with Ferguson whereby he would get a lot of lands, and this was to be the other end of it. I left the determination of those matters to my father, and acted as he desired, as he has a majority or practically all of the stock. I do not know what became of the deed when it was returned to be corrected, I have not seen it since. I never saw the correspondence about it; I was not interested in it, as I had but a few shares and the rest had a lot more; I think mother had more than I, and Seeley had; he sold his stock to my father; and the Norton estate had some stock, I have forgotten how much. Norton had five shares to start with, but there were assessments on that stock for a number of years, and the stock was issued as the assessments were made; shares were issued, and they kept paying in on the assessments, and every time they made an assessment, stock was issued. The corporation provides for \$100,000 of stock, in 1,000 shares. The first meeting of stockholders shows Henry Hewitt Jr. 490 shares, Lombard 490, A. N. Fitch 5, P. D. Norton 5, and S. S. King 10, but they might not get it on account of not paying for it; I don't know whether the certificates were issued. I have none of the correspondence in my possession; letters addressed to the company would come to the office and would be opened by anybody; my father took charge of these matters and everything was referred to him.

Cross-examination.

No meeting of the stockholders or trustees of the company has been held since the record of the meeting of June 1st, 1903, shown in the record book. No such meetings of the stockholders or trustees were held on May 29th, 1909, as shown by the minutes on pages 42 to 45 of the records of the secretary; the record book was turned over to Mr. York, our attorney, to bring the records up to date, and if they were approved, to sign them, but there were no such meetings held at all, and the stockholders or trustees were not gathered together for the purpose of holding any such meetings at or about May 29th, 1909. The company has been doing business about 25 years, and the only thing I know of their ever selling was a fractional forty over in King County. It was not really timber business, it was a clay bank and brick yard that they took in for some reason, and this man came along and wanted to buy it and they sold it.

That is the only sale the company made that I know of in 25 years, except a piece of land that was put into the company and taken right out, they just used the company as a matter of convenience. The company never received any consideration for the sale or the deed of the land to Ferguson so far as I know; the proposition to sell that land to Ferguson was not submitted by Henry Hewitt Jr. to any meeting of the trustees of the company; I was not authorized as secretary of the company to sign that deed, the records will show that. I never had any dealings with Ferguson personally about the matter of the sale and never heard of the Minnesota & Oregon Land & Timber Company until today; I had

no knowledge that they were interested in the land, and had no dealings with that corporation personally or as secretary of the Hewitt Investment Co.

Re-direct Examination.

No action was taken by the trustees of the Hewitt Investment Company authorizing or empowering me to execute the Ferguson deed; I signed it because when I came home after two or three months, Mr. Hewitt my father said here is a deed to sign; he was president of the company; I asked him what it was and he said he had a deal on with Ferguson to trade lands, and I signed the deed, and it was sent off down there, and the next thing I knew the deed came back for correction of the title or something, and the matter so far as I was concerned was dropped. I think the other director then beside myself and my father, was Rocena L. Hewitt, my mother; I think there were but three directors at that time.

The foregoing statement of the testimony and evidence admitted on the trial, for use on the appeal herein, is hereby approved this 28th day of March, 1913.

CHAS. E. WOLVERTON,
Judge.

[Endorsed]: Condensed statement of evidence. Filed March 26, 1913.

A. M. CANNON,
Clerk U. S. District Court.

[Defendant's Exhibit D.]

BY LAWS OF THE HEWITT INVESTMENT
COMPANY.

Art. 1. The officers of this corporation shall be a President, Vice President, Secretary and Treasurer, whose term office, except as provided in Art. 2., shall be one year, or, until their successors are elected and qualified.

Art. 2. The officers elected at the first meeting of the trustees shall hold their respective offices until the 29th day of May, 1891, or, until their successors are elected and qualified.

Art. 3. The annual meeting of stock-holders shall be held on the last Saturday in May of each year.

Art. 4. The Board of Trustees shall consist of five, to be elected from among stock-holders, said Board to be elected at the annual meeting of the stock-holders.

Art. 5. Each stock-holder shall be entitled to a vote for each share of stock held by him, and it shall be necessary for a majority of all the stock to be present and voting, either in person or by proxy, for the transaction of business.

Art. 6. Immediately after their election the Board of trustees shall meet and elect the officers of the corporation for the ensuing year.

Art. 7. The President shall preside at all the meetings of the Board of Trustees; sign all notes or evidence of indebtedness, deeds, mortgages and all other legal papers of the corporation. He shall be the General Manager of the Corporation, with full power to buy Real estate, notes, bonds or other evidences of indebtedness

or anything which the Company is authorized to hold, buy and sell, subject to the approval of the Finance committee, of which he shall be chairman.

Art. 8. The Vice President shall perform all the duties of the President—during his absence, or inability to attend to the duties of his office, and while performing such duties sign any and all papers with equal power as the President.

Art. 9. The Secretary shall attest all papers signed by the President or Vice President, and attach thereto the Seal of the Company, of which he shall be the custodian. He shall report to the stock-holders at their annual meeting, and to the trustees when requested.

Art. 10. The Treasurer shall be the custodian of the funds of the corporation, and shall make a report to the stock-holders of the corporation at the annual meeting, and to the trustees when required.

Art. 11. The Finance committee shall consist of the President and two other members of the Board of Trustees, to be appointed by him, and their duties shall be to advise with and approve the purchases and sales made by the President, and to audit the accounts of the Secretary and Treasurer from time to time, and report to the full Board.

Art. 12. The regular meetings of the Board of Trustees shall be held at the time and place of meeting of the stock-holders, but special meetings may be called by the President at his pleasure, or by a written request of any two of the members of the Board; and at all special meetings of the Board any business may be

transacted that may be transacted at the regular meetings.

Art. 13. These By Laws may be amended at any meeting, whether regular or special, by a vote of a majority of the Board.

[Defendant's Exhibit D-2.]

Tacoma, Wash., November 28th, 1890.

At the First meeting of the Stockholders of the Hewitt Investment Company, this day held at the Office of The Traders' Bank in the City of Tacoma, Washington, the Stock being present and represented as follows:—

Henry Hewitt, Jr.....	490	shares
B. Lombard, Jr.....	490	“ by proxy S. S. King.
A. N. Fitch	5	“
P. D. Norton	5	“
S. S. King	10	“

the following proceedings were had, to-wit:—

Mr. Henry Hewitt, Jr., elected temporary Chairman.

Mr. S. S. King elected temporary Secretary.

A set of “By Laws” having been prepared by S. S. King and A. N. Fitch, were read and approved and adopted as read

On motion of S. S. King, Henry Hewitt, Jr., was elected President. B. Lambard, Jr., Vice President. On motion of A. N. Fitch, S. S. King was elected Secretary and on motion of P. D. Norton, A. N. Fitch was elected Treasurer.

The following resolution was presented by A. N. Fitch, and adopted.

Whereas. Mr. Henry Hewitt, Jr., is the owner of

certain lands described as follows:

Lot 2, Sec. 2, T^p. 22 North Range 2 East, South West Quarter of North West Quarter and N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ and S. 2 of S. W. $\frac{1}{4}$ of Section 2, Townp. 14, North Range 4 West, Lot 11, Sec. 13, Lots 1 and 5 and S. 2 of N. E. $\frac{1}{4}$ and S. 2 of Sec. 24, and N. 2 of N. E. and S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ and N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of Sec. 25, Township 38, North, Range 5 East, The S. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ and E2 of S. E. $\frac{1}{4}$ and S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of Sec. 2 Township 14, North of Range 4 West and S. 2 of N. W. $\frac{1}{4}$ and N. 2 of S. W. $\frac{1}{4}$ of Sec. 22 and S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ and N. 2 of S. E. $\frac{1}{4}$ and S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ and S. W. $\frac{1}{4}$ Sec. 20 and S. E. $\frac{1}{4}$ of Sec. 30 all Township 14 North of Range 4 West, and Lots 1-2-3-4 and S. 2 of N. 2 and S. W. $\frac{1}{4}$ of Sec. 2 Township 13 North of Range 1 East and part of Lots 7 and 8 Sec. 18 and part of Lot 4 Sec. 19, township 14 North Rg. 2 West, and

Whereas he has offered to this Company the above described lands, for the sum of Twenty two Thousand Four Hundred and Thirty-five Dollars (\$22435.00) same being in full payment, excepting one item of Eight Hundred and Fifty (\$850.00) Dollars still due on one tract and

Whereas, it is the sense of this meeting be accepted, it is therefore

Resolved, that this Company purchase from Henry Hewitt, Jr., the above described lands, at the price above named and that the Officers be and they are hereby authorized and empowered to consummate the purchase and Transfer of said lands.

On motion of A. N. Fitch it was resolved that an assessment of Twenty-five (25) per cent of the Capital Stock of the Company be made, and that the same be payable on or before the first day of February, 1891.

The President appointed the following Finance Committee, to act with himself as such until the next annual meeting. B. Lombard, Jr. and S. S. King.

There being no farther business before the Trustees they adjourned subject to the call of the President.

S. S. KING, Secy.

[Defendant's Exhibit D-3.]

May 29th, 1891.

Newly elected Board of Trustees met in the Office of the Traders' Bank of Tacoma, and duly qualified, there being present in person Henry Hewitt, Jr., A. N. Fitch, P. D. Norton, and S. S. King.

A. N. Fitch was elected temporary Chairman.

S. S. King was elected temporary Secretary.

On motion Board proceeded to election of permanent Officers for the ensuing year. Vote resulting in the election of the following Officers

Henry Hewitt Jr. President.

B. Lombard, Jr. Vice President

A. N. Fitch Treasurer

S. S. King Secretary.

The President appointed, to act with himself as Chairman the following Finance Committee—

B. Lombard, Jr. and S. S. King.

On motion of A. N. Fitch the Finance Committee was authorized to purchase or contract to purchase or sell

any lands they might deem advisable.

On motion an assessment of 5 per cent on capital stock was called.

On motion Trustees adjourned subject to call of the President.

S. S. KING, Secy.

[Defendant's Exhibit D-4.]

Tacoma, Washington, January 2nd, 1901.

At a Meeting of the Board of Trustees of the Hewitt Investment Company, this day held, at which were present, Henry Hewitt, Jr., John J. Hewitt and C. M. Riddell; the Secretary being absent, on motion C. M. Riddell was duly elected Secretary protem. The resignation of Leonard Howarth, the Secretary and Treasurer of said Company was tendered to said Trustees. Upon motion of C. M. Riddell the same was accepted and ordered filed. The vacancy having in this manner occurred as to the Secretary and Treasurer of this Company, the Board proceeded to the election of Secretary and Treasurer, John J. Hewitt being nominated and there being no further nomination, on motion of C. M. Riddell the election of John J. Hewitt was made unanimous.

The President of said Company having submitted a proposition from L. Gerlinger to lease the West half of Sec. 2, and the N. E. of Sec. 2 Township 13, Range 1, West in Lewis County, State of Washington, for a term of Twenty (20) years, beginning January 2nd, 1901; and agreeing to pay therefor an annual rental in royalties of Ten (10) cents per ton for Bituminous Coal, and Five (5) cents per ton for Lignite Coal; but, agree-

ing in any event whether coal is mined from said premises to pay an annual rental of Seven hundred and fifty (\$750.00) Dollars, the Seven hundred and fifty (\$750.00) Dollars rental beginning on the 2nd day of July, 1902, and agreeing to pay the sum of One Hundred and fifty (\$150.00) Dollars as rental from the 2nd day of January, 1901 up and to July 2nd, 1902.

Upon Motion it was resolved that said proposition be accepted and the President of this Company is authorized and directed to enter into a written contract or lease for the time and under the terms as specified in the above proposition to execute the same in the Company's behalf. Upon Motion the meeting adjourned.

HENRY HEWITT, Jr.

President.

C. M. RIDDELL.

Secretary.

[Defendant's Exhibit D-5.]

Tacoma, Wn. May 31st, 1902.

Pursuant to previous notice given, the regular annual meeting of the stockholders of the Hewitt Investment Company met at the office of the Company at the City of Tacoma, Washington on Saturday, May 31st, 1902, at the hour of 2 o'clock p. m.

The meeting was called to order by President Henry Hewitt Jr., J. J. Hewitt, the company's Secretary acted as Secretary.

By direction of the President, the Secretary polled the stock of the Company. The same being done, the following stockholders were found to be present either in person or by proxy, to-wit:—

Henry Hewitt, Jr.	490 Shares
J. J. Hewitt	2 Shares
C. M. Riddell	1 Share
Mrs. R. M. Lombard by C. M. Riddell proxy	490 Shares
R. L. Hewitt by Henry Hewitt Jr. proxy	Shares

The result being announced the President declared there was a quorum present for the transaction of business.

The minutes of the previous stockholders meeting was ordered read. The same being read was duly approved as read.

The President then made a statement of the condition of the Company's property and mentioned the fact that certain of the Company property, a saw mill site on the Chehalis River between the towns of Chehalis and Centralia, on which the taxes had not been paid since 1895 on account of over valuation and assessment had been adjusted and paid in the sum of \$494.05 and that such action should be approved and ratified at this meeting and there should also be an assessment made of one per cent. on all the stock of the Company to meet and pay off all taxes against the Company's property.

On motion duly made and seconded, an approval and ratification of the President's act in paying the taxes on the mill site, and ordering that he be reimbursed to the amount paid, was carried unanimously.

C. M. Riddell then offered the following resolution:

Resolved that an assessment is hereby made of one per cent. upon all the stock of the Company for the purpose of paying all taxes upon the Company's property,

the same being duly seconded a vote was ordered taken by poll of the stock, which being done resulted in a unanimous vote in favor of the resolution.

The President then announced the nomination and election of a new Board of Trustees of the Company was in order. After the usual order of nominations and voting the following persons received a majority vote of the stock, and was declared elected as Trustees of the Company to serve for one year or until their successors were duly elected and qualified, to-wit: Henry Hewitt, Jr., C. M. Riddell, J. J. Hewitt, R. L. Hewitt and R. M. Lombard.

There being no further business before the meeting on motion the same adjourned.

J. J. HEWITT,
Secretary.

[Defendant's Exhibit D-6.]

Pursuant to notice given the stockholders of the Hewitt Investment Company met at the office of the Company, 744 Pacific Ave. in the City of Tacoma, Washington, on Saturday May 30th, 1903, at the hour of 2 o'clock P. M. The day being memorial day and a legal holiday, on motion the meeting was adjourned to meet on Monday evening, June 1st, 1903, at 7 o'clock P. M. at the corner of North 4th and E. Streets, No. 401, at which time the meeting was called to order by President Henry Hewitt, Jr. J. J. Hewitt the Company's Secretary acted as Secretary.

The Roll Call of stockholders being ordered and the same being taken it was declared that more than a majority of all stockholders were present, either in per-

son or by his or her duly credited proxy, therefore a quorum, for the transaction of business.

The minutes of the previous meeting of the stockholders was ordered read, the same being read was duly approved as read.

The Secretary-Treasurer reported that he had not his report quite completed but would soon have which would show the receipt and disbursement received and made for and in behalf of the Company since its last meeting. He stated that all taxes that were due against the property of the Company for the past year had been paid and receipt for same was on file in his office.

The Secretary further stated the sum of \$780.72 was received from land sold by the Company to A. J. Hayward, which sum would be more and sufficient to pay all taxes and other necessary and current expenses, therefore it would not be necessary to levy an assessment on the stock this year for the payment of any taxes.

The President then made some statements in regard to the property of the Company, as to its value and condition, saying it was unfortunate that the land did not lie more in one body but that it was much scattered over a large territory and stated that all the stockholders should confer and ascertain what price such land should bring at the present time and set a price the Company would be willing to take in case an offer for same should be presented.

The election of a new Board of Trustees being then in order the following persons were nominated, to-wit:— Henry Hewitt, Jr., R. M. Lombard, C. M. Seeley, J. J. Hewitt and R. L. Hewitt. There being no oth-

er nominations by motion it was decided the rules be suspended and that the Secretary be instructed to cast the vote of all stockholders present for such person for Trustee of this Company for the ensuing year and until their successor was elected and qualified. The vote being cast Henry Hewitt, Jr., R. M. Lombard, C. M. Seeley, J. J. Hewitt and R. L. Hewitt were declared the duly elected trustees of the Company.

There being no further business before the meeting on motion the same adjourned.

J. J. HEWITT,
Secretary.

And afterwards, to wit, on the 19 day of February 1913, there was duly filed in said Court, a Petition and Order for Appeal in words and figures as follows, to wit:

[Petition and Order for Appeal.]

*In the District Court of the United States for the
District of Oregon.*

MINNESOTA AND OREGON LAND AND TIM-
BER COMPANY, a corporation, and E. Z.
FERGUSON,

Plaintiffs,

vs.

HEWITT INVESTMENT COMPANY, a corpora-
tion,

Defendant.

To the Hon. CHARLES E. WOLVERTON, Judge of
said Court:

Your petitioner, Hewitt Investment Company, the

defendant in the above entitled cause, conceiving itself aggrieved by the judgment and decree rendered and entered by the above entitled court in the above entitled cause on the 3rd day of February, 1913, and believing that said judgment and decree is greatly to its prejudice and injury and is erroneous and inequitable, does hereby appeal from said judgment and decree to the United States Circuit Court of Appeals for the Ninth Circuit, and particularly from that portion of said judgment and decree whereby it is adjudged and decreed that your petitioner execute and deliver to the plaintiff, Minnesota and Oregon Land and Timber Company, a corporation, a deed of conveyance of the title to the land involved in this cause and appointing and authorizing a Commissioner of said court to execute and deliver such deed if your petitioner should fail so to do, for the reasons and upon the grounds specified in the assignment of errors which is filed herewith.

Wherefore, Your petitioner prays that its petition for said appeal may be allowed, and that a transcript of the record, proceedings and papers in said cause on which said judgment and decree was rendered and entered, may be duly authenticated and sent to said United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 19th day of February, 1913.

E. R. YORK,
Attorney for Defendant,
Hewitt Investment Company.

**[Order Allowing Appeal and Fixing Supersedeas
Bond.]**

The foregoing petition for appeal is hereby granted,

and the claim of appeal therein made is hereby allowed, and the amount of the bond on said appeal and to supersede and stay proceedings on said judgment and decree appealed from is fixed at the sum of Dollars.

Dated, this 19 day of February, 1913.

R. S. BEAN,
District Judge.

[Endorsed]: Petition for Appeal and Order Allowing Appeal.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 19 day of February 1913, there was duly filed in said Court, Assignments of Error in words and figures as follows, to wit:

[Assignments of Error.]

*In the District Court of the United States for the
District of Oregon.*

MINNESOTA AND OREGON LAND AND TIMBER COMPANY, a corporation, and E. Z. FERGUSON,

Plaintiffs,

vs.

HEWITT INVESTMENT COMPANY, a corporation,

Defendant.

Comes now the defendant, Hewitt Investment Company, and upon its appeal herein makes and files this assignment of errors upon which it will rely on said appeal:

1st. The court erred in overruling defendant's general objection made upon the trial to the admission of any and all parol evidence to establish the contract of sale alleged, for the reason that all such evidence is incompetent and inadmissible to prove such contract or any valid contract of sale of land under the statute.

2nd. The court erred in overruling defendant's objection and admitting in evidence the letter marked "plaintiffs' exhibit 1", for the reason that said letter is incompetent and inadmissible to prove the contract of sale alleged or any valid contract of sale of land under the statute or any escrow thereof.

3d. The court erred in overruling defendant's objection and admitting in evidence the letter marked "Plaintiffs' Exhibit 2", for the same reasons as stated in assignment 2nd.

4th. The court erred in overruling defendant's objection and admitting in evidence the letter marked "Plaintiffs' Exhibit 3", for the same reasons as stated in assignment 2nd.

5th. The court erred in overruling defendant's objection and admitting in evidence the letter marked "Plaintiffs' Exhibit 4", for the same reasons as stated in assignment 2nd.

6th. The court erred in overruling defendant's objection and admitting in evidence the letter from the Astoria National Bank to the Hewitt Investment Company, dated January 9th, 1906, for the same reasons as stated in assignment 2nd.

7th. The court erred in overruling defendant's objection and admitting in evidence the letter marked

"Plaintiffs' Exhibit 5," for the same reasons as stated in assignment 2nd.

8th. The court erred in overruling defendant's objection and admitting in evidence the letter marked "Plaintiffs' Exhibit 6," for the same reasons as stated in assignment 2nd.

9th. The court erred in overruling defendant's objection and admitting in evidence the letter marked "Plaintiffs' Exhibit 7," for the same reasons as stated in assignment 2nd.

10th. The court erred in overruling defendant's objection and admitting in evidence the letter marked "Plaintiffs' Exhibit A," attached to deposition of Henry Hewitt Jr., for the same reasons as stated in assignment 2nd.

11th. The court erred in overruling defendant's objection and admitting in evidence the letter marked "Plaintiffs' Exhibit B," attached to deposition of Henry Hewitt Jr., for the same reasons as stated in assignment 2nd.

12th. The court erred in denying defendant's motion for a non-suit and dismissal of the suit, made at the close of plaintiffs' case, for the reason that the evidence introduced by plaintiffs was insufficient to establish a valid contract of sale, or any title in plaintiffs to the land, or to entitle plaintiffs to the relief prayed or any relief herein.

13th. The court erred in its finding and decision that there was no definite parol agreement that Ferguson should procure other lands for purchase by defendant in trade and as part consideration for the alleged agree-

ment to sell and convey to Ferguson the lands involved in this suit.

14th. The court erred in its finding and decision that the alleged oral agreement and letters relating thereto constituted a valid or enforceable contract in writing for the sale of the lands involved herein, which a court of equity will require to be specifically performed.

15th. The court erred in its finding and decision that the deed sent to the Astoria National Bank constituted an agreement in writing for the sale of the lands involved in this suit, such as is required by the statute of frauds respecting the sale of lands.

16th. The court erred in its finding and decision that the deed sent to the Astoria National Bank was deposited in said bank as an escrow.

17th. The court erred in its finding and decision that Henry Hewitt Jr., as President, and the Secretary, of the defendant corporation were authorized or had power to execute the deed of conveyance of the lands to Ferguson.

18th. The court erred in its finding and decision that plaintiffs are entitled to a decree requiring the defendant to convey the lands to plaintiffs or either of them.

19th. The court erred in rendering the judgment and decree entered herein that the defendant execute and deliver to the plaintiff, Minnesota & Oregon Land & Timber Company, a conveyance of the title to the lands involved herein, and appointing and authorizing a commissioner of said court to execute and deliver such

deed if the defendant should fail so to do, for the reason that such portions of said judgment and decree are not justified or supported by, but are contrary to, the evidence, and that upon the evidence plaintiffs are not entitled to specific performance of the contract alleged, or to be decreed the title to said lands, or to have any relief herein.

Wherefore, Defendant prays for the reversal of said judgment and decree, and for the dismissal of this cause, with its costs.

E. R. YORK,
Attorney for Defendant,
Hewitt Investment Company.

[Endorsed]: Assignment of Errors. Filed Feb. 19, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 19 day of February, 1913, there was duly filed in said Court, a Bond on Appeal in words and figures as follows, to wit:

[Bond on Appeal.]

*In the District Court of the United States for the
District of Oregon.*

MINNESOTA AND OREGON LAND & TIMBER
COMPANY, a corporation, and E. Z. FERGUSON,
son,

Plaintiffs,

vs.

HEWITT INVESTMENT COMPANY, a corporation,
Defendant.

KNOW ALL MEN BY THESE PRESENTS: That we, Hewitt Investment Company, a corporation, organized and existing under the laws of the State of Washington, as principal, and The Title Guaranty and Surety Company of Scranton, Pennsylvania, as surety, are held and firmly bound unto the Minnesota and Oregon Land & Timber Company, a corporation, and E. Z. Ferguson, the plaintiffs in the above entitled cause, in the sum of Two Thousand and no-100 Dollars (\$2000.00), lawful money of the United States, to be paid to the said Minnesota and Oregon Land & Timber Company and E. Z. Ferguson, for which payment well and truly to be made we hereby bind ourselves, our successors, heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 19th day of February, 1913.

The condition of this obligation is such that

Whereas a judgment and decree was made, rendered and entered by the above entitled court in the above entitled cause on the 3d day of February, 1913, wherein and whereby said court adjudged and decreed that said defendant execute and deliver to the plaintiff Minnesota and Oregon Land & Timber Company, a corporation, a deed of conveyance of the title to the land involved in this cause, and appointing and authorizing a commissioner of said court to execute and deliver such deed if said defendant should fail so to do, and said Hewitt Investment Company has petitioned for and obtained an order allowing an appeal from said judgment and decree to the United States Circuit Court of

Appeals for the 9th Circuit, and desires to supersede and stay proceedings upon said judgment and decree, and a citation directed to said plaintiffs is about to be issued citing and admonishing them to be and appear in the said United States Circuit Court of Appeals for the 9th Circuit, upon said appeal:

Now, therefore, if the said Hewitt Investment Company shall prosecute its said appeal to effect, and shall answer all damages and costs that may be awarded against it if it fails to make its plea good, then the above obligation shall be void, otherwise to remain in full force and effect.

HEWITT INVESTMENT COMPANY,
(Seal) By HENRY HEWITT,
Its President.

Attest:

J. J. HEWITT,
Its Secretary.

THE TITLE GUARANTY AND SURETY
COMPANY,

By A. EDWARD KRULL,
Its Attorney in Fact.
By A. EDWARD KRULL,
Agent.

The foregoing bond with the surety thereon is hereby approved this 19th day of February, 1913.

R. S. BEAN,
Judge.

[Endorsed]: Bond on Appeal. Filed Feb. 19, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 19 day of February, 1913, there was duly filed in said Court, a Citation on Appeal in words and figures as follows, to wit:

[Citation on Appeal.]

UNITED STATES OF AMERICA,

District of Oregon—ss.

To Minnesota and Oregon Land and Timber Company, a corporation, and E. Z. Ferguson, Greeting:

WHEREAS, Hewitt Investment Company, a corporation, has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the District Court of the United States for the District of Oregon, in your favor, and has given the security required by law; You Are, therefore, hereby, cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 19th day of February in the year of our Lord, one thousand, nine hundred and thirteen.

R. S. BEAN,
Judge.

Service of the within Citation on Appeal, by receipt of a true copy thereof, is hereby admitted this 19th day of February, 1913.

C. W. FULTON,
Attorney for Plaintiffs,
Minnesota and Oregon Land and Timber Co. and E. Z.
Ferguson.

[Endorsed]: Citation on Appeal. Filed Feby. 19, 1913.

A. M. CANNON,
Clerk.

And afterwards, to wit, on Tuesday, the 8 day of April, 1913, the same being the 31 Judicial day of the Regular March 1913 Term of said Court; Present: the Honorable CHAS. E. WOLVERTON, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Order Certifying up Original Exhibits.]

*In the District Court of the United States for the
District of Oregon.*

MINNESOTA & OREGON LAND & TIMBER CO.,

v.

HEWITT INVESTMENT COMPANY.

It appearing to the Court that certain exhibits introduced in evidence on trial of this cause should be inspected by the appellate Court on the appeal of this cause, it is Ordered that defendant's exhibits G-G2-G3-G4-G5-G6- and G7 be certified up with the record by the Clerk of this Court to the United States Circuit Court of Appeals Ninth Circuit.

CHAS. E. WOLVERTON,
Judge.

And afterwards, to wit, on Saturday, the 15 day of March, 1913, the same being the 12 Judicial day of the Regular March Term of said Court; Present:

the Honorable CHAS. E. WOLVERTON, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Order Enlarging Time to File Transcript.]

In the District Court of the United States for the District of Oregon.

No. 3125.

MINNESOTA AND OREGON LAND AND TIMBER COMPANY, a corporation, and E. Z. FERGUSON,

Plaintiffs,

v.

HEWITT INVESTMENT COMPANY, a corporation,

Defendant.

Upon application of the attorneys for the plaintiffs and defendant, and for sufficient cause shown to the Court, it is hereby ordered that the time within which the defendant shall prepare and file its transcript upon the appeal of this cause to the United States Court of Appeals for the Ninth Circuit, be and is hereby extended for the additional period of sixty days, to-wit, until May 19, 1913.

CHAS. E. WOLVERTON,
Judge.

2

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

HEWITT INVESTMENT COMPANY, a corporation,

Appellant,

VS.

MINNESOTA AND OREGON LAND AND
TIMBER COMPANY, a corporation,
and E. Z. FERGUSON,

Appellees.

No.

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON.

BRIEF OF APPELLANT

STATEMENT OF THE CASE.

By bill in equity, appellees ask a decree either (1) adjudging appellee Minnesota and Oregon Land and Timber Company the owner of certain lands, or (2) compelling specific performance of an alleged contract to sell and convey the same.

Briefly stated, the bill alleges that the appellee corporation is organized under the laws of Minnesota; that appellant is a corporation organized under the laws of Washington; that the lands involved are all in Clatsop county, Oregon; that, in December, 1905, appellees desired and agreed to purchase the land for the Minnesota corporation, taking the legal title in appellee Ferguson; that appellant owned the land and was desirous of selling it; that an agreement was made between Ferguson and appellant whereby it was agreed appellant would sell the land to Ferguson for \$12,800, and would convey it "by a deed of the kind hereinafter mentioned, barring the error therein;" that appellant would make and deliver such deed to the Astoria National bank to be held by it in escrow and to be delivered to Ferguson on payment of the purchase price; that said agreement was in writing; that appellant knew that Ferguson was buying the land for the Minnesota corporation; that, thereafter, appellant executed a deed to the land and, on December 22, 1905, delivered the same to the bank to hold in escrow, and instructed the bank to deliver it to Ferguson on payment of the money; that such deed contained covenants of warranty; that, while otherwise in proper form, by inadvertence, the lands were described as being in township 6 south instead of 6 north; that the lands were described as being in Clatsop county, Oregon, all the townships of which were north of the government base line; that, on

January 3, 1906, Ferguson paid the money to the bank and the bank accepted it for appellant; that, thereby, appellees fully performed the conditions of the escrow and became the owners of the land "in fee"; that by the agreement, and the terms and conditions of the escrow, appellant was to furnish and convey to Ferguson a clear, valid record and marketable title to the land; that, about the time he paid the money to the bank, Ferguson discovered the mistake in the description of the land in the deed and requested appellant to correct it; that appellant agreed to do so and requested Ferguson to consent to a delivery of the deed to Henry Hewitt, Jr., president of appellant, for the purpose of having it corrected and returned to the bank; that, relying on that agreement, Ferguson consented; that neither of the appellees have ever consented that the deed be taken from the bank except for the purpose of correcting it; that the Minnesota corporation furnished the money to purchase the land; that appellant was the owner and is still the owner of the land, unless appellees became the owners on payment of the purchase price; that appellees believe that, ever since such payment, they have been the owners, Ferguson holding the naked legal title; that appellant wrongfully claims to be the owner of the land; that both parties intended that the deed should correctly describe the land, and appellees were not responsible for the mistake in it; that appellant has failed to correct the deed or to return it to the bank or to de-

liver it to appellees or either of them, and has refused and still refuses to do so; that appellees are and at all times have been ready and willing to pay over the purchase price of the land upon the execution and delivery to said Ferguson of a deed of conveyance of the land, or upon correction and redelivery to him of the deed withdrawn from the bank, and, since the payment of the money to the bank, have at various times notified appellant that they were willing to do so, but appellant has refused and refuses so to do; that, prior to beginning the action, appellees tendered and offered to pay \$12,800 to appellant if it would either correct the deed and redeliver it, or execute a new deed to Ferguson; but appellant refused and refuses to do either, and appellees accordingly bring the money into court to be paid over to appellant when a decree shall be entered vesting appellees or either of them with the title. (Transcript, 1-8).

All these allegations were denied by the answer of appellant, except that the following facts were admitted:

That appellant is a corporation organized under the laws of Washington; that the lands described in the bill are in Clatsop county, Oregon; that, on December 22, 1905, in conformity with an "oral understanding" between Ferguson and Henry Hewitt, Jr., upon representations made by Hewitt to appellant that Ferguson could and would procure and

convey to appellant in exchange for its lands certain other lands adjoining lands owned by appellant in Columbia county, Oregon, appellant signed a deed of conveyance to Ferguson; that such deed was mailed to the Astoria National Bank for delivery to Ferguson upon payment by him to appellant of \$12,800 net in Tacoma funds, and performance by Ferguson of the terms and conditions of his oral understanding with Hewitt, aforesaid, as part consideration for the conveyance; that Ferguson afterwards requested that appellant correct the deed; that appellant was and still is the owner of the land; that it has not corrected the deed or executed another, and has not delivered the deed to the bank or to appellees or to either of them, and has refused and refuses so to do.

The answer avers affirmatively that it has refused to convey the land for the reason that Ferguson did not at any time prior to the suit pay or tender to it the purchase price of the land, or keep or perform the conditions of the oral understanding between himself and Hewitt, which were the considerations agreed upon for conveyance of the land, viz: to procure and deliver to appellant the title to the other timber lands in Columbia county.

The allegations of the answer were put in issue by a reply.

A trial was had in the court below resulting in a decree requiring appellant to execute a deed to the

Minnesota and Oregon Land and Timber Company of certain particularly described lands, which deed "shall contain covenants" that the grantor is seized in fee simple, that the same are free from encumbrances, and that the grantor will warrant and defend the title thereto against the lawful claims of all persons whomsoever, beside other relief. (Transcript, 42). From that decree this appeal was taken and the cause is here for trial *de novo*.

The evidence and facts established by it will be best set forth in connection with the argument.

SPECIFICATION OF ERRORS RELIED ON AND DISCUSSED.

Appellant contends that the rulings of the trial court, and the decree entered thereon, are erroneous, in this:

1. That the evidence offered by appellees, and admitted over appellant's objection, was incompetent and insufficient to establish a valid contract of sale under the statute of frauds.
2. The written evidence admitted is incomplete, and does not contain all the writings between the parties relating to the contract alleged.
3. The evidence fails to show a meeting of the minds of the parties, or any mutual contract of sale.
4. The deed was not deposited in bank as an escrow.

5. Neither the contract of sale or deed was authorized by appellant corporation, nor made by any agent of appellant authorized thereto in writing.

6. To enforce specific performance would be grossly inequitable.

7. The decree entered is contrary to the law and the evidence.

ARGUMENT.

We propose to discuss the several points above specified in their order.

(I)

(A) THE DECREE IS BASED UPON INCOMPETENT EVIDENCE RECEIVED OVER THE OBJECTION OF APPELLANT MADE AT THE TIME.

At the opening of the trial, appellees offered in evidence a deposition of Henry Hewitt, Jr., whereupon the following occurred:

"The defendant objected to the testimony contained in the deposition on the ground that it is incompetent for the purpose of establishing a valid contract of purchase, under the statute of frauds, and as an attempt by this evidence to establish an agreement of sale of land by parol it is incompetent for such purpose.

"The Court: I think you can let it be understood that the objections are raised and that the court, without passing upon the objection, takes it under

consideration to be determined at the time of the final adjudication. * * It will be understood on this trial that all rulings are deemed excepted to by the party against whom the ruling is made." (Transcript, 45-46).

Later, E. Z. Ferguson, appellee, called by appellees, testified, and, during his examination, the following occurred:

"Q. When did these negotiations commence, Mr. Ferguson? Just tell how they commenced, and give a history of it.

"Mr. York: I think, at this time, * * * I want to object to any and all testimony by way of oral evidence which may be offered for the purpose of establishing a contract for the sale of the lands involved in this suit, upon the ground that any such testimony is incompetent for the purpose of proving or establishing a contract for the sale of lands under the statute. I make this objection at this time as a general objection, if the court will so consider it, to avoid making the objection from time to time. The court will understand that I make it as a general objection to all testimony of this character.

"Mr. Fulton: I am willing it should be so understood.

"The Court: Very well. The court will take it under advisement as far as ruling on the objection is concerned. I suppose you want to show this testi-

mony for the purpose of connecting up this correspondence.

"Mr. Fulton: Yes, sir. The statute, of course, requires some note or memorandum to be made in writing expressing the consideration and describing the property. We claim we have all that, but we must connect it by the testimony.

"The Court: I understand the points made by both parties. I will allow the testimony to be received.

"Q. Just proceed, Mr. Ferguson, and tell your story of these negotiations—what you did." (Transcript, 57-58)

Thereupon the witness testified: "We agreed on a deal. The price for the lands was \$20 per acre, for which they were offered by Mr. Hewitt, acting, as I understood, for the Hewitt Investment Company. * * I agreed to pay the \$20 per acre. * * Mr. Hewitt didn't seem particularly anxious to sell, but * * we agreed that he would take the \$12,800 * * for the four claims, and would send the deed to the Astoria National Bank. He told me that he would have the deed executed, and would send it over, and I was to go home * * and pay the money. (Transcript, 59). * * I informed Mr. Hewitt that the Minnesota and Oregon Land and Timber Company was purchasing the land * * that I was buying the lands for the company. (Transcript, 69-70). * * I think I requested Mr. Hewitt to send the deed to the Astoria National Bank. This request was made when

I was in Tacoma at the time we made the bargain for the lands; he said he would have it fixed up * *. I told him the abstracts would have to be made and if we found the title was all right we would pay the money." (Transcript, 125).

The admission of all such testimony was error, under the statute of frauds, and the rule as to contracts within the statute, that if the contract was not in writing, or if the writings are incomplete, indefinite, or deficient in some one or more of the essentials required to make out a valid contract, parol evidence can not be received to supply the defects, for this would be to do the very thing prohibited by the statute.

17 Cyc., 748 e.

Broadway Hospital vs. Decker, 92 Pac. Rep., 445 (Wash.).

Grafton vs. Cummings, 99 U. S., 100.

(B) THE EVIDENCE IS INSUFFICIENT TO ESTABLISH
A VALID CONTRACT UNDER THE STATUTE
OF FRAUDS.

The statute of Oregon reads:

"In the following cases the agreement is void, unless the same or some note or memorandum thereof, expressing the consideration, be in writing, and subscribed by the party to be charged, or by his lawfully authorized agent: * * An agreement * * for the sale of real property or of any interest therein. * * An agreement concerning real

property made by an agent of the party sought to be charged, unless the authority of the agent be in writing."

I Oregon Code, Sec. 797.

And, "*evidence, therefore, of the agreement shall not be received, other than in writing, or secondary evidence of its contents * * **"

Id.

Hence, if any contract such as equity will decree specifically performed has been established, its terms must be found in written evidence, subscribed by appellant, or its agent thereunto authorized in writing, unaided by the oral testimony of witnesses given at the trial.

This is the rule in Oregon, where the lands here involved are situate, and elsewhere:

Catterlin vs. Bush, 65 Pac. Rep., 1064 (Ore.);
Mossie vs. Cyrus, 119 Pac. Rep., 485 (Ore.);
Hartenbower vs. Uden, 90 N. E. Rep., 298
 (Ills.);
Rahm vs. Klerner, 37 S. E. Rep., 293 (Va.);
Seymour vs. Oelrichs, 106 Pac. Rep., 91 (Cal.);
Shumway vs. Kitzman, 134 N. W. Rep., 320
 (S. Da.);

and, tested by it, the proof fails in the case at bar in that

(a) The writings in evidence do not show the material terms of the contract alleged in the bill;

(b) The writings in evidence fail to show that the agent who assumed to act for appellant was authorized as required by the statute; and

(c) The evidence shows that writings necessary to a full understanding of the real terms of the agreement have been suppressed by appellees and it is impossible to ascertain from those adduced at the trial what the contract was.

(a)

**The Terms of the Contract do not Appear from the
Written Evidence Introduced.**

The court below was of opinion that "what was done and what was written relative to the transaction, including the deed that was sent to the bank, constituted a valid contract in writing for the sale of these lands by the defendant to plaintiff Ferguson." (Transcript, 36).

And, if this conclusion be not correct, it is manifest the decree should be reversed, since it is nowhere found by the court that the deed became operative as a conveyance of the land, while the evidence is insufficient to sustain the decree upon any other theory, as will be shown later.

It is apparent, from the opinion filed in the court below, that the court, in arriving at its conclusion

that there was a valid contract of sale, took into consideration every one of the seventeen letters shown in the record and the deed. In this, it fell into error, since a number of the letters were not entitled to consideration for such purpose, nor, as we shall show, can the deed be thus used in aid of the contract. Analysis of the correspondence will demonstrate this. Thus, the letters dated July 24 and September 25, 1905 (Transcript, 56-57, 130), may be laid aside, having resulted in nothing. In that of July 24, Ferguson proposed a trade with Mr. Hewitt. Hewitt declined to trade, but said he "might" sell the lands in 6-6. That ended the matter. (Transcript, 76). In the letter of September 25, Ferguson offered \$8,000 for four claims in "6-6." No reply to this appears in evidence. The letter written December 22, 1905, by Ferguson to Hewitt (Transcript, 82), has no place in the present inquiry, for it was not answered, and there is no writing subscribed by appellant or its agent agreeing to anything said in it. So, too, of the letter of January 3, 1906, from Ferguson to the bank (Transcript, 48-49); not only was it not answered, but it nowhere appears that appellant or its agent ever heard of the letter until the day of the trial, and no reference to it will be found in any writing subscribed by appellant or its agent. The letters of January 8 (Transcript, 68-69), January 25 (Transcript, 84-86), and January 26 (Transcript, 92-93), written by Ferguson to Hewitt, are also imma-

terial on this branch of the case, since neither was answered, and no writing is in evidence, signed by appellant or its agent, assenting to anything said in either of them. Nor, do the letters from the bank (Transcript, 50-51, 83), the first returning the deed for correction, and the other inquiring whether "there is any possibility of the trade being closed," aid appellees in this respect, since no answer to either of them appears, nor does either letter refer to any term of the contract of sale.

With those letters eliminated, the following correspondence remains from which the contract must be ascertained:

On December 22, 1905, Mr. Hewitt wrote to the bank—

"Please deliver the enclosed deed of lands in 6-6 West to E. Z. Ferguson for \$12,800.00 net to us in Tacoma funds. We have notified Mr. Ferguson and he will probably call for the deed at an early date." (Transcript, 47).

On the same day, he wrote to Mr. Ferguson—

"We have today sent deed for lands to Astoria N. Bk., which they will deliver to you on payment of \$12,800.00. I will send you a check for commissions when money is received of $2\frac{1}{2}$ per cent. Our directors would not allow more and in fact did not like to deed the land at all. We consider this land worth 30,000. However, if you can find us the land you promised, will send my son or another

good cruiser to look over lands and in some way make good my promise to you. Now hustle and *find the other land*. It must be comeatable and good logging chance finally." (Transcript, 63).

Twelve days later, January 3, Ferguson wrote appellant—

"On December 26th, I wrote you in regard to the title to your land which I am purchasing, stating there was lacking in the title, a power of attorney from Harriet M. Lockwood to Herbert S. Griggs, but up to this time have no reply. My attorney has examined the abstract in regard to this title, but in addition to the power of attorney which is lacking, he finds two other matters which need attention. In the deed which you sent here, the description reads T. 6 S. instead of T. 6 N., also it does not appear that the Hewitt Investment Company has complied with the Oregon laws governing foreign corporations. I think for your own protection, that you would wish to straighten up this last matter on account of your other Oregon lands. I do not know how seriously this affects the title, but think it would be better if it was straightened up. I have today deposited in the Astoria National Bank the sum of \$12,800, the sum to be sent to you in Tacoma Exchange when the title to this land is made perfect in me. I do this so that you will understand that I am not endeavoring to gain time, but am ready and willing to take over the deal whenever it is in shape for delivery.

In regard to the commission of $2\frac{1}{2}$ per cent., as mentioned in your letter, I think it was thoroughly

understood between myself and Mr. Henry Hewitt that I was to have 5 per cent., and I think, of course, that I should have it, but if the company absolutely refuses to allow more than $2\frac{1}{2}$ per cent., I will, of course, take the lands anyway. You can inform Mr. Hewitt that I will probably send him today or tomorrow maps and data regarding the other timber proposition that I talked with him about. I think that one of them, at least, will appeal to him. Trusting you will favor me with an early reply, Yours truly," (Transcript, 61-62).

On the same day, Ferguson wrote Hewitt—

"This morning I wrote to the Hewitt Investment Co., which letter you will undoubtedly receive about the time that you receive this, and at noon today *I received your letter of the 2nd*, to which I hasten to reply. I think, in order to get this matter straightened up with the greatest possible speed, it would be best for you to prepare a new deed making it just the same as the former deed, excepting to state that the land is all in T. 6 N., R. 6 W., W. M., instead of T. 6 S. as it now reads. It is evident from the deed in the bank that you have a copy and can see how this mistake occurred. This deed you can send to the bank to be substituted for the one that is now in their hands.

"If, at the same time, you have an original power of attorney from Harriet M. Lockwood, it could be sent over and recorded in this county. If you haven't the original, you can have a certified copy made from the records there which will answer the same purpose, but before doing this, I would sug-

gest that you examine the power of attorney carefully and see if it conveys sufficient power to enable Mr. Griggs as her attorney to convey lands in Oregon, otherwise, it would be of no use and it would be necessary to obtain a deed direct from Mrs. Lockwood. Under the Oregon laws, the wife's interest is absolutely necessary to have. We are very particular in regard to our titles, because we expect to sell this land some day and do not wish to have any trouble when the time comes.

"In regard to the Hewitt Investment Company's having failed to comply with the Oregon laws governing foreign corporations, we will not let this delay the deal, but will take it for granted that you will straighten it up at your leisure, but would like to know, when you write me the exact amount of the Company's incorporated capital. Thinking it possible that you may not be fully informed as to the Oregon laws, I enclose you herewith some circular matter that I have received from the Secretary of State as I happen to have a surplus of them on hand. Trusting that you will find the power of attorney all O. K., yours truly,

"P. S. In regard to the commission of 2½ per cent. instead of 5 per cent. as you agreed, I hardly think that you should cut me off from this, as it was thoroughly understood between us, and I believe that after you have considered the matter fully, that you will persuade the company to allow it. However, in any event, we want the land whether the company will allow us 5 per cent. or not. I am enclosing you under separate cover, one

of the propositions that I talked about when I was in your office." (Transcript, 65-67).

Two days later, January 5, Hewitt replied to the latter letter—

"Your favor of Jan. 3 received. I have written Astoria Nat. Bank to return deed and as you suggest will make out new deeds. Mr. Griggs has the old Hattie Lockwood deeds signed by him as power of attorney and will send new deed for her to sign. It may take some little time.

"About the commission ,the Company some time ago passed resolutions to only allow 2½ commissions for sales of lands, of which I was not informed, and besides this when I brought the matter up the directors all but myself were against selling and would not have consented at all only to accommodate me. I should have brought the matter up. Of course you know what any officer promises is only good for his best endeavors to carry out his promise. You are mighty lucky to get the land at all.

* * *

"Now about those lands you send me descriptions. The Red & Black look good providing the mill gets rates to Eastern points same as Portland. Do the Oregon Short Lines assume this extra rates? If Hammond owns this road evidently he has already bottled up this poor mill company. You say timber can be bought for 30c, he charges them \$2.00, how is this and what will he do to us if we buy the other timber and will he not also bottle us up? What is

the quality of timber? Is it old growth yellow fir and high land spruce and how large and what proportion spruce, is there any cedar, etc., and how about quality? How much hemlock and what will that cost, if anything, and don't you know of something better that we should have a fair chance to succeed if we operate in competition with Portland?

"Advise bank to return deeds, Hewitt." (Transcript, 64-65).

On the same day, appellant wrote the bank—

"The Hewitt Investment Co. or Henry Hewitt, Jr., sent you some time ago deeds to deliver to E. Z. Ferguson on payment of \$12,800. I think the deeds it seems are faulty and Mr. Ferguson wants them changed. You will please return them and oblige," (Transcript, 50).

This completes the written evidence introduced at the trial admissible for the purpose of determining the terms of the alleged contract.

It is elementary that—

"Certainty in every essential particular, whether of terms or description, is indispensable to the specific performance of agreements."

2 Warvelle on Vendors, Sec. 740.

And that "a court of equity will not decree specific performance where it is not clear from the evi-

dence that the *exact terms thereof* were agreed upon and understood, * *.” (Id., Sec. 871).

The terms of the contract alleged in the bill, briefly stated, are as follows:

That appellant would sell the lands to Ferguson for the use and benefit of the Minnesota corporation.

That the consideration for the sale was \$12,800.

That appellant should make a deed conveying the land and deliver it to the bank in escrow until the money should be paid.

That the lands so to be conveyed were those particularly described in the bill; and

That appellant should furnish and convey to Ferguson a clear or valid record and marketable title.

We contend that *not one* of these terms is established by the written evidence adduced at the trial.

IT DOES NOT APPEAR THAT APPELLANT AGREED TO
SELL THE LANDS TO OR FOR THE USE AND BENE-
FIT OF THE CORPORATION.

This term of the contract cannot be said to be immaterial. There might well be good reason to refuse to sell the land to the corporation, though appellant was willing to sell to Ferguson. That the term was deemed material by appellees is clear from the allegations of the bill that—

“ * * * plaintiffs desired and agreed to purchase said real estate for the use and benefit of the plaintiff corporation and as its property (Transcript, 2); and * * * that while said deed was to be executed to plaintiff Ferguson, as grantee, defendant was informed by plaintiff Ferguson and well knew at the time said agreement was made and at all times thereafter, that plaintiff Ferguson was purchasing said real estate for the plaintiff corporation and with its money.” (Transcript, 3).

Its materiality is still further emphasized by the prayer of the bill and by the decree, pursuant to the prayer, requiring appellant to convey the lands to the corporation. (Transcript, 8, 42).

No proof whatever of the allegations of the bill in this respect will be found in the writings set out above, or in any writing to be found in the record, nor are they established by the oral testimony of witnesses at the trial. Such proof was material and necessary, because it is well settled that

“Every one has a right to select and determine with whom he will contract, and can not have another person thrust upon him without his consent.”

Ark. Smelting Co. vs. Belden Co., 127 U. S., 387.

Snow vs. Nelson, 113 Fed. Rep., 358.

In fact, it would appear by appellees' own evidence that the appellee corporation was not in existence at the time of the transaction, for appellee

Ferguson testifies that: "We were purchasing for the parties who *afterwards* formed the Minnesota and Oregon Land and Timber Company." (Transcript, page 58).

While it may be that the writings above referred to, standing alone, tend to show that the money consideration for the transfer of the title was \$12,800, which was the cash payment required for delivery of the deed; yet we will show later on that that amount of money was not the sole, or even the principal, consideration for the conveyance of the title to the land.

No Agreement of Escrow Appears in the Writings.

The writings offered in evidence may be searched in vain for any agreement by appellant that it would execute a deed of conveyance of the land involved in this suit, and would deliver such deed to the bank to be held in escrow until the money was paid. There is no writing containing any such term of the contract of sale alleged in the bill. The only writings approaching the subject are the letter of Hewitt to Ferguson, dated December 22nd, and the letter of Hewitt to the bank of same date transmitting the deed and stating that Ferguson would probably call for it at an early date. (Transcript, 63, 47). The deed was sent by Hewitt to the bank as his agent merely for delivery on payment of the money, without any of the usual escrow conditions,

either expressed or implied; and the deed was received by the bank merely "for collection." (Transcript, 83).

The only other evidence on this point is the testimony of Ferguson as to his conversation with Hewitt at Tacoma, that Mr. Hewitt then said he "would send the deed over to the Astoria National Bank; he told me that he would have the deed executed, and would send it over, and I was to go home, which I did, and pay the money." (Transcript, 59). Ferguson also testified that the deed was sent to the bank on his verbal request to Hewitt, but there was no special agreement as to conditions of delivery, or payment of the money, which would constitute an escrow. (Transcript, 125).

This brief statement appears sufficient to clearly show that the writings in evidence do not support or establish the contract alleged in respect to delivery of the deed to the bank in escrow, but this subject will be more fully considered and discussed later on under the head that there was no deposit of the deed as an escrow and appellees never became entitled to delivery of the deed.

Nowhere in the Letters will be Found any Description of the Lands Involved.

It is elementary that a contract, to entitle it to specific performance in equity, must contain a certain description of the land. The court will look in

vain for any description sufficient to identify the land to be sold in any written evidence subscribed by appellant or its agent in the case at bar. The letters mention lands in "6-6," but there is no attempt to describe the lands mentioned in the bill. Nor, even though the deed could be referred to in aid of the letters in this respect, it is not in evidence. It may or may not have described the lands intended to be conveyed with sufficient certainty—there is no competent proof of the fact.

Grafton vs. Cummings, 99 U. S., 100.

The only writing shown in the record describing the lands involved in this suit is the letter of Ferguson to the bank, dated Jan. 3rd, of which letter neither appellant nor Mr. Hewitt had any knowledge until same was produced at the trial, and the letter was then admitted in evidence over appellant's objection. (Record, pages 47, 48).

The trial court in its opinion held that "what was done and what was written relative to the transaction, including the deed that was sent to the bank, constituted a valid contract in writing for the sale of these lands." (Record, page 36). In this, we submit that the court erred, for the reasons, that no writing signed by appellant or its agent described the lands, the deed did not correctly describe the lands, was not delivered, or deposited in bank as an escrow, and can not be considered as evidence of a

valid contract to convey or to supply any defects or insufficiency in the letters to prove a valid contract.

There is no Proof in the Writings that Appellant agreed to Furnish or Convey to Ferguson a Clear or Valid Record or Marketable Title.

It is alleged in the bill that appellant was to furnish a clear or valid record and marketable title, and the money was withheld by Ferguson for the reason that the title had not been *perfected* in him; but there is an absence of convincing proof that appellant ever *agreed* to make the title perfect of record.

True, there is an implied agreement in every sale that the vendor owns the property or is entitled to sell it; and it might, perhaps, be held in this case that there was an implied agreement on the part of appellant that it owned these lands; but that is a very different thing from an undertaking that its title was or would be made *perfect of record* or marketable.

The only instrument in writing, subscribed by appellant or its agent, to be considered in this connection, aside from certain letters necessary to an understanding of the terms of the contract not offered in evidence and to be referred to later, is the deed sent to the bank.

THE DEED CANNOT BE CONSIDERED FOR THE PURPOSE
OF DETERMINING ANY OF THE TERMS
OF THE CONTRACT.

Not only is the deed itself absent from the record, but, under the circumstances disclosed, even though the deed were here, it could not be resorted to as proof of the alleged contract of sale or any of its terms.

Kopp vs. Reiter, 34 N. E. Rep., 942 (Ills.);
Hartenbower vs. Uden, 90 N. E. Rep., 298
(Ills.);
Cooper vs. Thomason, 45 Pac. Rep., 296 (Ore.);
Wier vs. Batdorf, 38 N. W. Rep., 22 (Neb.);
Swain vs. Burnette, 28 Pac. Rep., 1093 (Cal.);
Day vs. Lacasse, 27 At. Rep., 124 (Me.);
Halsell vs. Renfrow, 78 Pac. Rep., 118 (Okl.);
Same case, 26 Sup. Ct. Rep., 610;
Nichols vs. Opperman, 34 Pac. Rep., 162
(Wash.).

It is apparent that the court below considered the deed sent to the bank, in connection with the correspondence and acts of the parties proven by parol testimony in arriving at its conclusion. (Transcript, 36). But it will be found, under the authorities above cited, this instrument cannot be consulted for such purpose.

In this respect, the case of *Halsell vs. Renfrow*, 26 Sup. Ct. Rep., 610, is much in point. An agent

entered into an agreement to sell land. The owner confirmed the proposed sale by telegraph. Later, it was found that a portion of the tract had already been sold, and that another portion was in possession of a tenant who declined to vacate. The agent and purchaser came to an agreement as to that part of the land previously sold, but not as to the leased land. The owner was willing to convey and take proceedings to oust the tenant, but the purchaser declined to take the conveyance unless he could be given possession within thirty days. In that situation, the owner executed a deed and sent it to a bank with instructions to deliver it to the purchaser on payment of the purchase price. The purchaser still declined to take the deed unless fuller possession could be given, whereupon the owner sold the premises to another man. Thereafter, the original purchaser brought suit to compel specific performance of the contract of sale. In denying relief, the Supreme Federal Court said:

“So far * * as the writings convey the notion of an absolute undertaking to convey a present clear possession, *they do not express the modified bargain* to which Renfrow was willing to assent. The delivery of the deed was authorized only upon payment of the price, and acceptance of it would have been an assent to Renfrow's terms. *But there was no such assent.* The plaintiffs say now that the differences were only trifles, not going to the essence of the contract, but they were enough at the

time to make them unwilling to accept the deed." (612, Opinion).

So, here, if the writings convey the notion of an absolute undertaking to convey title, *they do not express the modified bargain* proposed by Ferguson that the title should be *perfect of record*. The delivery of the deed was authorized only upon payment of the price, and an acceptance of it would have been an assent to appellant's terms. *But there was no such assent*. The bank was instructed to "deliver the enclosed deed * * for \$12,800 net to us in Tacoma funds, * *" (Transcript, 47), and Ferguson was notified of the fact. (Transcript, 63). Instead of paying the money over and accepting the deed, he notified appellant:

"I have today deposited in the Astoria National Bank the sum of \$12,800 * * to be sent to you * * *when the title to this land is made perfect in me.*" (Transcript, 62).

And, even up to the time of the commencement of this action, and the alleged deposit of the money in court for appellant, it is manifest there had never been an unconditional payment or tender of the money, for we find Ferguson testifying at the trial, as already shown, that he did not consult appellant about withdrawing the money from the bank because

"I considered the money was there subject to *my* order, and *I had a right to withdraw it* without ob-

taining any consent of Mr. Hewitt" (Transcript, 73-74).

And, in his letter to Mr. Hewitt, written on January 25, 1906, we find him saying:

"Now in regard to paying interest on the \$12,800 *until you perfect the title* * *. I would like to know how long a time you would wish to have to straighten the title * *. *If it can be arranged satisfactory to all of us*, I would rather pay the money over to *you*. In case we would pay the \$12,800 to the Hewitt Investment Company and take its warranty deed to the land, *would you and the company be willing to give me an agreement and assurance that you would perfect the title*, say within a year, or longer, if need be?" (Transcript, 84-86).

It is thus made clear that, at that time, no completed agreement had been reached between these parties for the sale of the land, and there had been no acceptance of the offer of appellant as made. The letter from which we quote was never answered, and in none of the writings in evidence will be found any undertaking on the part of appellant to *perfect the title of record*. As said by the court in *Halsell vs. Renfrow*, last cited:

"There may have been a previous oral agreement, such as is suggested by the letter and deed, but before any memorandum was made, and while Renfrow (appellant) was still free, the plaintiffs were informed that Renfrow would undertake to do *only what he could*" (612, Opinion).

In the case at bar, while the negotiations were still in progress, the appellant exercised its right to recall the deed. Until the negotiations had ended and there had been a completed contract of sale, the transaction constituted no more than an offer to sell which appellant might withdraw at will. Under such circumstances, the authorities hold that, unless the deed expresses the *terms of the contract* of sale proposed to be proven, it is inadmissible in aid of other testimony to satisfy the statute of frauds.

In *Cagger vs. Lansing*, 43 N. Y., 550, a deed actually in escrow was held insufficient to satisfy the statute, the court saying:

“The counsel * * insists that the deed * * delivered in escrow is a contract for the sale of the land executed by the intestate. This position cannot be sustained. The deed purports to be a conveyance of all the intestate’s interest in the premises for a consideration therein expressed of \$1,000, *but is wholly silent as to the terms of the contract pursuant to which it was made.*”

In *Swain vs. Burnette*, 89 Cal., 564, the court says:

“ * * an undelivered deed, executed in pursuance of an oral agreement of sale, cannot be regarded as a sufficient memorandum to satisfy the statute of frauds, *unless it is shown to have contained a memorandum of the oral agreement.*”

And, in *Kopp vs. Reiter*, 34 N. E. Rep., 942, the Supreme Court of Illinois declared:

“Many cases cited as authority for the position that a deed executed by an owner of land, but not delivered, is a sufficient memorandum of a contract of sale, under the statute, will * * be found, upon examination, to refer to *deeds containing the terms of the contract*” (944, Opinion).

The Oregon court, in *Cooper vs. Thomason*, 45 Pac. Rep., 296, citing *Kopp vs. Reiter* with approval, says:

“ * * the deed deposited in escrow, unless it contained a memorandum of the agreement, was inoperative to take the case out of the statute of frauds” (299, Opinion).

In *Hartenbower vs. Uden*, 90 N. E. Rep., 298, the Illinois court, speaking again to the point, said:

“It is essential * * that the writings contain everything necessary to show the contract between the parties, so that there be no need of parol proof of any of the terms or conditions of the sale or the intention of the parties. The contract cannot rest partly in writing and partly in parol, but the written memorandum must disclose all the terms. * * The undelivered deed * * contains no conditions whatever, and makes no mention of the terms of the contract upon which it was made. It purports to be simply a conveyance of the land. It is no memorandum or note of the contract” (300, Opinion).

Wier vs. Batdorf, 38 N. W. Rep., 22 (Neb.), often cited and followed, declares:

"We have made a pretty thorough search, but have been unable to find any case which sustains the position that an undelivered deed may be treated as a memorandum in writing. * * It is sometimes said that * * letters may be used as a memorandum of the contract. * * In a proper case, there is no doubt of the admissibility of such evidence; but the rule, if invoked in this case, would not aid plaintiff. Here, the contract rested in parol, *neither party being bound until the delivery and acceptance of the deed*. The case, therefore, comes clearly within the statute of frauds."

And, in *Catterlin vs. Bush*, 65 Pac. Rep., 1064, the Oregon court says:

"The memorandum and the contract or agreement are not to be confounded as one and the same thing. The memorandum is understood to be a note or minute * * of the agreement, * * expressing briefly the essential terms, and was never intended to stand as and for the agreement itself. The necessary elements are that it must contain the essential terms of the contract, expressed with such a degree of certainty that it may be understood *without recourse to parol evidence* to show the intention of the parties. * * It must show * * and disclose the terms and conditions of the agreement."

Here, no deed has been offered in evidence, and it is impossible to determine whether this deed did

or did not contain any of the terms of the agreement pursuant to which it was made.

**Nor does it Appear that the Agent of Appellant, who
Negotiated the Sale, was Authorized Thereto
in Writing.**

The Oregon statute not only requires that the terms of the contract be proven by written evidence; but, that, if the writings are signed by an agent, his authority to act must also be shown to be written.

The application of this rule will operate to exclude several of the letters received below from consideration by the court and render the evidence most decidedly *unsatisfactory* for any purpose. The negotiations for this sale were carried on almost entirely between Mr. Ferguson and Henry Hewitt, Jr., the president of the company. So far as the letters were signed by Mr. Hewitt, he must be deemed to have acted as the agent of appellant, yet there is no proof that his authority so to do was in writing. The nearest approach to such evidence is found in the by-laws of the company, in which it is provided that the president—

“ * * shall be the general manager of the corporation, with full power to *buy* real estate
* * or anything which the company is authorized to hold, buy and sell, subject to the approval of the finance committee, of which he shall be chairman” (Transcript, 144).

But this is far from proof that Mr. Hewitt was authorized to negotiate a sale of this land. It is plain, the authority conferred by this by-law was to *buy*, not to *sell*, land; and unless the court can find in this record clear and satisfactory evidence that authority was given by appellant corporation to Mr. Hewitt as its agent to *sell* the land, and that such authority was in writing, the evidence is insufficient to establish a valid contract of sale under the statute.

Again, if full consideration be given to every writing offered and received at the trial, it is manifest that—

THE WRITTEN EVIDENCE, ESSENTIAL TO A FULL UNDERSTANDING OF THE TRANSACTION INVOLVED, IS INCOMPLETE, AND WRITINGS MATERIAL THERETO ARE OMITTED.

The burden rests upon appellees to prove, by clear, satisfactory and convincing evidence, every essential term and condition of the alleged contract.

Jones vs. Patrick, 145 Fed. Rep., 440.

If the contract alleged in the bill had been embodied in a single instrument, and, upon presentation of that instrument, it appeared that the document had been mutilated by removing a portion of it evidently containing matter necessary to a full understanding of the contract, we submit, the court would not hesitate to reject the instrument alto-

gether, unless the mutilation was accounted for and secondary evidence of the contents of the missing parts received; nor does the case at bar differ from the case supposed.

If we turn to the writings offered and received at the trial, not only do they fail to prove the terms of the agreement alleged in the bill, but it is clear that other written evidence essential to an understanding of the transaction has been omitted by appellees.

The rule is that—

“Where a writing offered refers to another writing, the latter should also be put in at the same time, provided the reference is such as to make it probable that the latter is requisite *to a full understanding of the effect of the former.*”

3 Wigmore on Evidence, Sec. 2104.

In the letter of January 3, written by Ferguson to Hewitt, we find him saying:

“ * * at noon today, I received your letter of the 2nd, to which I hasten to reply. I think, in order to get this matter straightened up with the greatest possible speed, it would be best for you to prepare a new deed * * ,” etc. (Transcript, 65-66).

Here is a reference to a letter presumably in the possession of appellees, relating to the transaction involved, plainly requisite to a *full* understanding

of the matter in hand; yet the court will search the record in vain for the letter of the "2nd."

Again, in the letter written by Ferguson to Mr. Hewitt, dated January 25, 1906, the writer says:

"Your recent letter received; it has no date, but was probably written January 13th as the letter to the bank, to which they have called my attention, is dated the 13th. * * I noticed in the letter to the bank, that you say that I promised to get you other lands just as good for 30c per 1,000; you will please pardon me for contradicting you on this point * * ," etc. (Transcript, 84).

Here is a reference to *two* letters, evidently signed by the agent of appellant with whom the negotiations were carried on, clearly relating to the terms of the alleged contract and necessary to any *full* understanding of the transaction; yet neither of these letters was offered in evidence, although presumably in possession of the appellees.

In this situation, we submit, the written evidence is incomplete and wholly insufficient to establish the alleged contract or to satisfy the statute.

(III.)

THE EVIDENCE FAILS TO SHOW A MEETING OF THE
MINDS OF THE PARTIES UPON THE TERMS AND
CONDITIONS OF THE CONTRACT.

"It is an essential element of all contracts that the minds of the parties meet and that they assent

to the same thing in the same sense, and, as some of the cases put it, at the same time."

Foshier vs. Fetzner, 134 N. W. Rep., 556, 564
(Iowa);

Watters vs. Lincoln, 135 N. W. Rep., 712;

Miles vs. Hemenway, 111 Pac. Rep., 696
(Ore.).

And specific performance—

" * * should never be granted unless the terms of the agreement * * are clearly proven, or where it is left in doubt whether the party against whom relief is asked in fact made such an agreement."

Hennessey vs. Woolworth, 128 U. S., 442;

Dalzel vs. Mfg. Co., 149 U. S., 315.

And "*especially, in a case like this, where, as appears, the property was rapidly increasing in value.*"

De Soller vs. Hanscome, 158 U. S., 222.

We will show later on that the property involved in the case at bar rapidly increased in value between December 22, 1905, and the commencement of the suit, and that the minds of the parties never met upon the *same thing in the same sense at any time.*

A few days before the deed was sent to the bank, Mr. Hewitt and Mr. Ferguson had a talk at Tacoma, which evidently resulted in the forwarding of

that instrument. Testifying concerning that conversation (over the objection of appellant that oral testimony was incompetent in the premises), Mr. Ferguson said:

"Mr. Hewitt didn't seem particularly anxious to sell, but, after talking it over * * and telling him that I thought he could take the money and do better elsewhere with it, anyhow, why—we agreed that he would take \$12,800, \$20 an acre, for the four claims, and would send the deed over to the Astoria National Bank. He told me that he would have the deed executed and would send it over, and I was to go home * * and pay the money. *That was about all the main points of the transaction*" (Transcript, 59).

Mr. Hewitt testified concerning the same talk—

"The agreement * * was made a very short time before we made the deed * *. All prior negotiations up to that time had closed. Mr. Ferguson came personally and convinced me that it would be a good thing for me to let him have these lands and he would buy me those other lands from 25 to 30 cents a thousand. * * I told him I didn't have the money but would sell these lands at the price he made, *providing we could get the other lands*. * * He told me he had the offers and could get the other lands at that price; that was the inducement for me to get my son to sign the deed. *The consideration was getting these other lands for less money, adjoining our other lands. If those other lands had not been agreed to be procured for our company, I would not have procured* * *

the execution of this deed. My son absolutely refused to sign the deed and I told him that Ferguson had promised to get me these other lands. * *. My son was secretary of the Hewitt Investment Company" (Transcript, 76-77).

The correspondence, too, shows plainly that it was agreed in that conversation that Mr. Ferguson was to do something more than pay over the purchase price of the land. Just what that something was may be in doubt, when the testimony is considered as a whole, but that the minds of the parties did not meet upon it, is plain. Thus, in the first letter from Mr. Hewitt to Ferguson following the talk, he says:

"We consider this land worth 30,000. However, *if you can find us the land you promised*, will send my son * * to look over lands * *. *Now hustle and find the other land* * * " (Transcript, 63).

No denial that he had promised to find the other lands appears in any of the subsequent letters signed by Mr. Ferguson. On the contrary, the letters show that he recognized an obligation on his part in this respect and made some attempt to carry out his promise. On January 3, he writes to appellant—

"You can inform Mr. Hewitt that I will probably send him today or tomorrow maps and data regarding the other timber proposition I talked about, * * " (Transcript, 62).

On the same day, he writes to Hewitt—

“I am enclosing under separate cover one of the propositions that I talked about when I was in your office” (Transcript, 67).

On the day the deed was sent, before he had received notice of it, Ferguson wrote to Mr. Hewitt—

“Up to this time, I have been too busy to send you the map of *the other land*, but will do so soon. * *” (Transcript, 82).

Replying to a letter from Hewitt concerning certain lands, descriptions of which had been forwarded by him, Ferguson says:

“As to the land in 5-9, in connection with the Seaside Mill Co., I have to say that the statement that you make is undoubtedly true,” etc. (Transcript, 68-69).

And, after withdrawal of the deed and repudiation of the agreement by appellant, claiming that the promise made by Ferguson during that conversation had not been kept, on January 25, we find Ferguson writing to Hewitt—

“I noticed in the letter to the bank that you say that I promised to get you other lands just as good for 30c per 1,000; you will please pardon me for contradicting you on that point * *. What I said was that from 25c to 30c per 1,000 was about as high as any of the timber buyers were paying * * and that I was satisfied you could take the

money that you received for this land and buy other lands for a less price * *. I also mentioned particularly that there were some lands adjoining the Hewitt Investment Company's lands which I felt certain that you could purchase for less than you were receiving * * and, in the course of the conversation, *I said I would make you a map showing this land and send it to you*" (Transcript, 84-85).

While it is clear he had not even then fulfilled the promise he thus admits he made, for he immediately adds—

"Since coming home, I have been too busy to get this up as I wanted to, but will enclose the map herewith * *" (Transcript, 85).

If there be some conflict in the testimony of the witnesses concerning what was said and what promises were made during that conversation, the fact only emphasizes the wisdom of the rule excluding and forbidding resort to such testimony in aid of writings to prove the terms of such contracts. Looking to the writings alone, it is apparent that *some* agreement was made or attempted to be made between the parties here, the terms of which cannot be ascertained without the aid of other testimony. As to what it was, the recollection of the parties differ, but that it was material to the negotiations in hand cannot be doubted. We find one party referring to it in the correspondence, and the other referring to the same thing, but declaring that he

was misunderstood or misconstrued. It is plain from this, that the minds of the two men did not meet in agreement upon *the same thing in the same sense* at least as to this feature of the undertaking, hence there was no completed contract.

At least two distinct conditions to a completed contract were imposed by these parties, neither of which is definitely stated in the writings: one, imposed by Ferguson, required that the *record* title should be made *perfect and marketable*; the other, imposed by appellant, required that other lands, adjoining those owned by it in another county, be procured for it at a much less price than it was to receive for the lands sold. That no agreement was reached concerning either of these conditions seems certain. If appellant was to furnish a *perfect* record title, the fact does not appear from the writings; while, if Ferguson was to procure other lands in which to invest the money at a profit, he does not appear to have understood that he was to do so. The burden of proof on these matters was upon the appellees, and, if the contract was complete in either respect, it was incumbent upon them to produce written evidence of it. So far as the testimony of witnesses at the trial is concerned, the writings strongly corroborate that of Mr. Hewitt, and, when the real value of the land is considered (of which more hereafter), his version of the talk, and of what was agreed upon, appears much more reason-

able than that of Mr. Ferguson. At all events, wherever the truth may lie, it is clear there was no meeting of the minds upon the same thing in the same sense at any time, and, under the authorities, specific performance must be denied. See, in addition to cases already cited,

Lambert vs. Gerner, 76 Pac. Rep., 53.

And where the writings, representing the negotiations of parties for the sale of land, fail to show that one of them agreed to a condition required by the other, there was no meeting of the minds in a completed contract so as to render it enforceable, and an agreement thereto can not be shown by parol.

Colleton Realty Co. vs. Folk, 67 S. E. Rep., 156.

In *Pressed Steel Car Co. vs. Hansen*, 128 Fed., 444, it was said:

“Where it is doubtful whether an agreement has been concluded, and unless the proof is clear and satisfactory, both as to the existence of a contract and as to its terms, specific performance will not be enforced.”

* In the same case on appeal, 137 Fed. (C. C. A.) 403, it was held (syll) :

“To warrant a decree for the specific performance of a contract, such contract must be clearly and unequivocally proved, and its terms, as to subject-

matter, consideration, and all other essentials, must be specific and unambiguous.”

Logue vs. Langan, 151 Fed. (C. C. A.), 150.

The rule is well settled that the contract can not rest partly in writing and partly in parol, but it must be wholly established by the writing, unless there has been a part performance, or possession taken and improvements made, none of which facts were alleged or proven in this case.

Wilson vs. Hoy, 139 N. W. (Minn.), 817.

“In order that any agreement, whether covered by the statute or not, whether written or verbal, may be specifically enforced, it must be *complete* in all its parts; that is, all the terms which the parties have adopted as portions of their contract must be *finally and definitely settled*; and none must be left to be determined by future negotiations; and this is true without any regard to the importance or unimportance of these several terms.”

Kane vs. Luckman, 131 Fed. 616, citing—

Pom. Spec. Perf., Sec. 145.

In *Halsell vs. Renfrow*, 78 Pac., 118, for specific performance, it was said:

“In order to be sufficient (to make a binding contract under the statute) the letters, telegrams and writings relied upon must, by reference to each other, disclose every material part of a valid con-

tract, and must be signed by the party sought to be charged. They must set out the parties, the subject matter, the price, the description, terms and conditions, and leave nothing to rest in parol. (Citing cases.) It is a general rule that parol evidence can not be permitted to supply any omission of any essential element of the contract." Affirmed in 202 U. S., 287.

The evidence shows a complete failure of any mutual agreement between the negotiating parties; the negotiations and correspondence were carried on by the parties upon a different basis of purpose, intent, and understanding of the agreement proposed to be made, and resulted in no mutual agreement which either party was entitled to have specifically enforced.

This court has stated that:

"A suit for specific performance can only be maintained where the terms of the agreement are so precise that they cannot be reasonably misunderstood. * * And where the contract is susceptible of different reasonable interpretations, *a court of equity ought not to take the chances of decreeing its specific execution in a way which will possibly do violence to the intention of the parties* * *."

Minnesota Tribune Co. vs. Asso. Press, 83 Fed., 357.

(IV.)

THE DEED WAS NOT DEPOSITED IN BANK AS
AN ESCROW.

It was seriously contended in the court below that—

“The deposit of the deed in the bank was an escrow and, in contemplation of law, the deed was still there when this suit was instituted, for, it being in escrow, it could not be withdrawn without the consent of both parties, and the withdrawal was for a single purpose, namely, to correct an error, and the defendant had no right to retain it beyond the time necessary to correct the error.”

Since it is probable this contention will be renewed here, although it does not appear to have been sustained below, we will address ourselves to it briefly.

The transaction shown by the correspondence is that of a vendor forwarding papers to a bank for *collection* of the purchase price of lands, with authority to deliver the deed on payment of the money by the vendee. The bank became merely the *agent of appellant* to receive the money and deliver the deed. There is no word of any escrow, or of any agreement of the bank to receive the deed as an escrow, or of any agreement by the parties that there should be an escrow, in any of these letters, nor do they establish the *fact* that the instrument in truth constituted an escrow.

The case of *Van Valkenburg vs. Allen*, 126 N. W. Rep., 1092 (Minn.), is directly in point, wherein the court says:

“The case did not involve an escrow in the technical sense. There was no delivery to a custodian *in pursuance of an agreement of the parties* to the transaction, either express or implied. *The bank was not a party to the agreement, and was in nowise agreed upon by the parties as the custodian. It was merely Allen’s agent*; its possession was Allen’s possession; the deed it received was under Allen’s control and dominion.”

In that case, as in the case at bar, a deed was sent by a vendor of realty to a bank for delivery to the vendee on payment of a named sum.

So, too, the Supreme Court of Oregon says:

“It was not a deposit upon a contract with him *that it should be deposited*, nor had he a right to demand that it remain in escrow for his benefit or for any period of time.”

Davis vs. Brigham, 107 Pac. Rep., 963 (Opinion).

“In order that an instrument may operate as an escrow, not only must there have been sufficient parties, * * *but the parties must have actually contracted*. When the instrument purports to be a conveyance of land * *, the grantor must have sold and the grantee must have purchased, the land. A proposal to sell or a proposal to buy, though

stated in writing, will not be sufficient. The minds of the parties must have met, the terms must have been agreed upon, and both must have assented to the instrument as a conveyance of the land, which the grantor would then have delivered and the grantee received, *except for the agreement then made that it be delivered to a third person*, to be kept until some specified condition be performed, and thereupon be delivered to the grantee by such third person." Id.

"Therefore, the remittance of the deed * * was not an escrow, and was subject to his recall at any time before it was delivered." Id.

That the deed was received *for collection by the bank* is further shown by the postal card acknowledging its receipt, as follows:

"Your favor of the 22nd inst. received with enclosures as stated. (Entered *for collection*.) J. E. Higgins, Cashier" (Transcript, 83).

Nor did it become an escrow upon the payment of the money into the bank, since the money was not paid in as the money of appellant, but as that of Ferguson. This is apparent, not only from the letters alluded to, but from the testimony of Mr. Ferguson at the trial that—

"At the time I withdrew the money from the bank, I didn't ask or obtain any consent of Mr. Hewitt to such withdrawal. *I considered the money was there subject to my order*, and I had a right to

withdraw it without obtaining any consent of Mr. Hewitt" (Transcript, 73-74).

If the money was thus subject to the withdrawal by appellees, clearly the deed was also subject to recall by appellant.

The transaction thus disclosed by the letters and testimony did not create an escrow, or constitute a delivery of the deed, which would give the appellees title. At all times, the deed was in the hands of the bank as the agent of appellant, subject to its complete control. As said by Mr. Devlin:

"Where the grantor retains the right of control over the deed, it is not an escrow, notwithstanding it may have been deposited with a third person with instructions to deliver it to the grantee upon the compliance with certain specified conditions. Where a grantor places a deed in the hands of a third person, to be delivered upon payment of the consideration, in pursuance of a correspondence in writing as to the purchase and sale of the land, agreeing upon the terms but not describing the land, *the grantor may at any time before payment destroy the deed.*"

1 Devlin on Deeds (3rd Edition), Sec. 273 a.

The case of *Miller vs. Sears*, 27 Pac. Rep., 589 (Cal.), is also in point, where it is said:

"It can not be held that plaintiff's papers were delivered to the defendants as an escrow. There was no contract of sale concluded between the plain-

tiff and the other parties to the negotiations, *as the question of title remained to be settled to the satisfaction of the contracting parties*. This fact alone is fatal to the contention of respondents that they held the documents in controversy as an escrow."

In the case at bar, the letters prove beyond controversy that, at the time the deed was withdrawn by appellant, and up to the time when appellant refused to complete the sale, the question of title remained to be settled to the satisfaction of Ferguson. Thus, in the letter of January 3, written to appellant, he says:

"I have today deposited in the * * bank the sum of \$12,800, the sum to be sent to you * * *when the title to this land is made perfect in me*" (Transcript, 61-62).

And in all the subsequent correspondence between the parties, even as late as January 25, it is made clear that the title still remained to be settled to the satisfaction of Ferguson as a condition precedent to a completion of the sale (See Transcript, 84-85).

In a later California case, it is said that, to constitute an escrow—

"The grantor must clearly and unequivocally evidence an intent and purpose to part with the possession and control of the deed for all time."

Hayden vs. Collins, 81 Pac. Rep., 1120.

No such evidence appears from the letters adduced in evidence here, or even from the testimony as a whole.

And see—

Wier vs. Batdorf, 24 Neb., 83 (38 N. W. Rep., 22);

Day vs. Lacasse, 27 At. Rep., 124 (Me.);

King vs. Upper, 106 Pac. Rep., 612 (Wash.);

Freeland vs. Charnley, 80 Indiana, 132.

We have already demonstrated that there was no escrow at all in the case, but, if we were to concede that it was competent to prove an escrow agreement by parol, and that the evidence adduced at the trial compelled a finding that there was an escrow, still the decree rendered in this cause cannot be sustained.

APPELLEES NEVER BECAME ENTITLED TO DELIVERY OF DEED.

It is elementary that, as pre-requisite to any right to compel specific performance of a contract, the plaintiff must show that he has himself performed his part of it. Hence, it was incumbent upon appellees on this branch of the case to prove that they had, at least, paid or tendered the purchase price of these lands and so become entitled to a conveyance of the title.

It is entirely clear from the testimony of Ferguson at the trial that there had never been an uncon-

ditional payment or tender of the alleged purchase price of these lands to appellant prior to the commencement of the suit. From first to last, appellees were insisting that the record title be made *perfect* in Ferguson as condition precedent to payment of the purchase price, and, even down to the commencement of the suit, and the withdrawal of the money from the bank by Ferguson to deposit in court, there was no time when appellant could have obtained the money, since the bank was instructed to deliver it over *only* when the title should have been *perfected* in Ferguson, and, as testified to by him—

“I considered the money was there subject to my order *and I had a right to withdraw it without obtaining any consent of Mr. Hewitt*” (Transcript, 73-74).

Clearly, since the right of withdrawal must be mutual in the premises, if appellees could withdraw the money, appellant could withdraw the deed. The money had not been paid to the bank to be delivered to appellant unconditionally, but was held by the bank as the agent of Ferguson, not to be paid over until the record title should have been perfected as required by appellees.

In this situation, there can be no doubt, appellees had not become entitled to possession of the deed at the time the suit was begun, and the action should

have been dismissed whether there was an escrow or not.

In a brief filed in the court below, appellees insisted that the suit was not one for specific performance at all; that—

“The deed was deposited in escrow and the money was paid to the party holding the deed, and we contend that * * the equitable title vested in the plaintiff Ferguson, or his principal, the Minnesota and Oregon Land and Timber Company. * * As a matter of fact, Ferguson was purchasing for the corporation plaintiff, and it could not make any possible difference to the defendant which one was principal so long as it was paid its money.”

Since this position is likely to be assumed by appellees in this court, we will briefly consider it here.

If the premise asserted were sustained by the evidence, the argument to be based upon it might require an answer; but the premise fails. The deed was not delivered in escrow, the money was not paid over to appellant or to the bank for it without condition, the condition on which the money was deposited in bank was never complied with, and it does make a difference whether Ferguson or the appellee corporation was principal in the contract to purchase the land.

We have demonstrated by the highest authority that the corporation appellee cannot be thrust upon

appellant as purchaser of the land without its consent in writing signed by appellant or by its agent authorized in writing to do so, and we need not repeat what we have said on that subject.

It is equally clear from the evidence already set forth in this brief that the money deposited in bank remained subject to the order of appellees until the commencement of this suit, and was withdrawn from the bank by Ferguson without any notice to or consent of appellant; and that there was never a time, until long after the deed was withdrawn from the bank, if the time ever came, when appellant could have obtained the money. And—

**There was Never any Delivery of the Deed in Escrow
or Otherwise Such as Would Operate to
Pass the Title to Appellees.**

Such agreement as may have been made with reference to the deposit of the deed with the bank was made at the time Mr. Ferguson and Mr. Hewitt met at Tacoma. It was, therefore, a part of the contract of sale upon which appellees rely, and must be evidenced by some writing; but, if we were to concede that it is competent to prove the alleged escrow by parol, the result would be the same. Mr. Ferguson testified on this point—

“I think I requested Mr. Hewitt to send the deed to the Astoria National Bank. This request was made * * at the time we made the bargain for the lands * *. I don’t know that there was any

special agreement as to the conditions under which the money was to be paid into the bank. Mr. Hewitt was to send the deed over, we were to have the abstract of title made, *and when the title was perfect, we would pay the money and take the deed*" (Transcript, 125-126).

Later, a deed that proved unsatisfactory to appellees was forwarded to the bank with instructions to deliver it to Ferguson for \$12,800 (Transcript, 47); and Ferguson was notified that the bank would deliver that instrument to him on payment of that sum (Transcript, 63). The bank received the instrument and entered it *for collection* (Transcript, 83). A few days later, Ferguson deposited \$12,800 in the bank with instructions that—

" * * when the title to the said land shall have been made *perfect in me* * * " it should be paid over—

" * * and that pending the making of said title perfect in me, *you shall hold this money and deed in your possession*" (Transcript, 48-49).

At that time, three defects in the title were pointed out by appellees to be cured as condition precedent to a delivery of the deed:

(a) A mistake in the description of the land in the deed;

(b) The lack of an essential power of attorney of record; and

(c) A failure of appellant to comply with certain laws of Oregon (Transcript, 48-49).

In this situation, the instrument deposited with the bank was withdrawn and never returned, and the defects complained of were never cured (Transcript, 50-51).

In order that there shall be a delivery of a deed in escrow, effective as a conveyance, not only must there have been a completed sale, in which the minds of the parties have met, and the terms have been fully assented to, but—

*“ * * both parties must have agreed upon the instrument as a conveyance of the land * *.”*

1 Devlin on Deeds, Sec. 313 (3rd Edition).

And “as long as the proposals for sale or purchase are pending, it makes no difference whether the nominal grantor retains possession of the instrument, or it is placed in the hands of a third person. In either case it is ineffectual as a deed or an escrow.”

Id.

While “if a deed is deposited with a third person, by one of the parties to a contract * * to be delivered to the other as soon as the question of title to the land shall have been determined satisfactorily to the contracting parties, the delivery cannot be considered as a valid delivery in escrow. The custodian of the deed in such case is a mere depositary subject to the orders of the grantor.”

Id., Sec. 313 a;

Miller vs. Sears, 91 Cal., 282 (De Haven,J.);

Davis vs. Brigham, 107 Pac. Rep., 963 (Ore.).

It is apparent, in the case at bar, the instrument sent to the bank was not acceptable to appellees and was never agreed upon "as a conveyance;" the question of the sufficiency of the title was still unsettled at the time the deed was withdrawn from the bank; and, since the depositary remained "subject to the orders of the grantor," appellant was entitled to withdraw the instrument without the consent of the appellees.

The deed having been rightfully withdrawn and no other instrument having been deposited with the bank, it is idle to talk of any delivery in escrow by which an equitable or any title was vested in appellees.

(V.)

THE SALE AND DEED WERE NOT AUTHORIZED BY APPELLANT CORPORATION.

The evidence shows that the sale and deed were made without authority therefor given by the corporation. The organization of the corporation provided for a board of five trustees or directors, and a finance committee composed of the president and two other trustees, which finance committee should "advise with and approve the purchases and sales made by the president"; and the president was au-

thorized "to *buy* real estate, * * subject to the approval of the finance committee" (Transcript, 144-145). Henry Hewitt, Jr., was president of appellant corporation, and a member of the board of trustees and of the finance committee, and his authority was thus limited by the by-laws. He testified that no authority was at any time given to him as president, by resolution or other action of the trustees or stockholders or finance committee, to make the sale or deed in question (Transcript, 78); this testimony is corroborated by J. J. Hewitt, secretary of appellant (Transcript, 142-143), and is uncontradicted.

Henry Hewitt, Jr., further testified that he told Ferguson, at the time the oral agreement was made, that he could not act for the corporation, and Ferguson knew it, but all he could do was to endeavor to get Ferguson the land if Ferguson would carry out his agreement (Transcript, 77-78). Hewitt was acting in the transaction as a personal matter, but had no authority to contract or sell the land without authority from the corporation, and he so informed Ferguson (Transcript, 81). The other members of the board of trustees and finance committee, when consulted, objected to the sale, and J. J. Hewitt signed the deed, as secretary, only on the assurance that Ferguson would procure the other lands for purchase by the company, and then the sale would be reported to the trustees and their

sanction obtained (Transcript, 108-117-120); but the transaction was never authorized or ratified by the corporation because Ferguson did not procure the other lands.

The evidence shows that the matter was handled as a personal transaction by Mr. Hewitt; all of the letters written to Ferguson and the bank were in his individual name, except the letter of Jan. 5th to the bank requesting return of the deed. There is, therefore, no evidence of any writing in the name of the corporation, or signed by any of its officers or agents as such (except the undelivered deed, which is not competent evidence of the contract of sale,) to take the case out of the statute of frauds, which provides that an agreement concerning real property made by an agent of the party sought to be charged is void, unless the authority of the agent be in writing.

The power of the president of a corporation is measured by the authority conferred by its charter and by-laws; he may be given power to make contracts and conveyances for the corporation, but his authority, further than specially conferred, does not extend to contracts or other acts not incident to the ordinary business of the corporation. The evidence shows that selling land was not the ordinary business of the corporation; practically no other lands had been sold, and no custom or ordinary course of

transaction of the business of selling lands had been established.

The evidence was that the appellant bought the Oregon lands, but did not sell any; since the purchase of the lands, this was the only business transaction it had in the state, and it had "never deeded any land, and didn't have any custom" (Transcript, 86-122).

It has been repeatedly held that the president of a corporation, in the absence of express or implied authority conferred on him, has no power, merely by virtue of his office as president, to contract to sell, convey, or exchange the real property of the corporation.

3 Clark & Marshall, Corp., p. 2128-2136;

Harding vs. Ore.-Idaho Co., 110 Pac. (Ore.), 412.

"The mere fact that one is a director, president, secretary or other officer of a corporation, does not make all his acts or declarations, even though relating to the affairs of the corporation, binding upon the latter. Such persons are mere agents, and their declarations are binding upon the corporation only when made in the course of the performance of their authorized duties as agents." 3 Clark & Marshall, Corp., p. 2226.

And especially will this limitation upon the power of the president be recognized and enforced, when the party dealing with him is expressly informed at

the time of his lack of general authority. Ferguson was informed when the agreement was made that he had not authority to act alone for the corporation, and in the letter of Jan. 5th (Transcript, 64) Hewitt wrote Ferguson that "the directors all but myself were against selling and would not have consented at all only to accommodate me. * * Of course you know what any officer promises is only good for his best endeavors to carry out his promise," which corroborates Hewitt's testimony that the agreement was then known to be only his personal "promise" to sell the land, which was to be subsequently authorized and ratified by the corporation in case Ferguson procured the other lands for purchase, as promised by him.

The president has no inherent power to contract for the corporation, and when authority to buy or sell property is expressly conferred, the power must be exercised in the manner conferred. The president has no implied power to sell and convey, or bind the corporation by his contract to sell and convey, the real property of the corporation. Under the theory of implied power, the president is authorized to sell the property or goods bought or manufactured by it for the *purpose of being sold in the line of its ordinary business*; but, outside of the transaction of the ordinary business of the corporation, the president has no implied or ex-officio power to sell or convey the property of the corporation, in the absence of proof of authority or custom.

2 Thompson on Corp., 2nd Ed., 1455, 1470;
Ansley Land Co. vs. H. Weston Lumber Co.,
 152 Fed., 841.

So far as the contract of sale alleged was negotiated or made by Henry Hewitt, Jr., as the agent of appellant, any such agreement concerning real property was void under the Oregon statute of frauds, unless his authority as such agent was in writing. No competent evidence of such written authority given to Mr. Hewitt appears in the record.

(VI.)

TO DECREE SPECIFIC PERFORMANCE IS GROSSLY
 INEQUITABLE.

The courts do not grant specific performance of contracts as a matter of right, but only in the interests of justice, and upon clear and convincing evidence that the contract was made.

White vs. Wansey, 116 Fed. Rep., 345.

“It should never be granted unless the terms of the agreement sought to be enforced are clearly proven, or where it is left in doubt whether the party against whom relief is asked in fact made such an agreement.”

Hennessey vs. Woolworth, 128 U. S., 442;
Dalzell vs. Mfg. Co., 149 U. S., 315.

Or where the property was rapidly increasing in value.

DeSoller vs. Hanscome, 158 U. S., 222.

In the case at bar, about a year elapsed after the transaction before suit was brought to compel performance of the contract, while, in the meantime, the value of the land had rapidly increased. This is made clear by the testimony of appellee Ferguson that the value of timber through that country “raised after that quite rapidly, and was raising all the time in 1906 and 1907. Timber went up very rapid during 1906. * * Timber went up very rapidly after this deal was made. * * The price of this land had advanced considerably before this suit was begun. The timber today on those four claims involved in this suit would be worth anyhow \$40,000, possibly more” (Transcript, 124-125).

It follows, if the decree appealed from is allowed to stand, appellant will be compelled to donate to appellees outright \$27,000, being the difference between \$40,000, the admitted value of the timber alone, and \$12,800 claimed by appellees to be the agreed price for both the *land* and timber. Only the clearest possible proof that appellant agreed to sell the land for that sum, under the terms and conditions alleged in the bill, could justify the decree entered—proof wholly absent from this record.

(VII.)

THE DECREE IS CONTRARY TO THE LAW AND
EVIDENCE.

Whether this suit be considered one to establish an equitable title or to compel specific performance of a contract to sell, appellant contends, upon the grounds and authorities herein presented, that the decree of the trial court is not warranted or sustained by the law and evidence, but is contrary thereto, and is inequitable to appellant.

Without reviewing the argument made, or the facts proven and the law applicable thereto, appellant respectfully submits: That the trial court erroneously admitted incompetent evidence in support of the contract of sale alleged; that the competent evidence was insufficient to establish a valid contract of sale; that the alleged contract of sale is not evidenced by any writing; that the deed sent to the bank is not competent as evidence to prove the terms of the alleged contract; that the terms of the contract are not proven with sufficient certainty or clearness to warrant specific performance; that the minds of the parties never met upon any mutual contract; that the agent of appellant who negotiated the sale was not authorized by appellant or in writing; that there was no escrow agreement made, nor any deposit of the deed in escrow; that appellees never made an unconditional tender or

payment, and never became entitled to delivery of the deed; and to compel specific performance or to award the lands to appellees, would be grossly inequitable.

For the foregoing reasons, appellant respectfully submits that the decree should be reversed and the suit dismissed.

E. R. YORK,
T. W. HAMMOND,
Attorneys for Appellant,
Tacoma, Washington.

3

IN THE

United States Circuit Court of America

NINTH DISTRICT

HEWITT INVESTMENT COM-
PANY, a Corporation,

Appellant,

vs.

MINNESOTA & OREGON LAND &
TIMBER COMPANY, and E. Z.
FERGUSON,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF OREGON

BRIEF OF APPELLEES

FULTON & BOWERMAN
Attorneys for Appellees

STATEMENT OF THE CASE.

This suit is prosecuted by appellees, whom we shall hereafter, for convenience, designate as plaintiffs, against the appellant corporation, which we shall hereafter designate, for convenience, as defendant. The de-

fendant, a corporation, under the laws of the State of Washington, owned four quarter sections of land in Township Six (6), North of Range Six (6), West of the Willamette Meridian, in Clatsop County, State of Oregon, which the plaintiff, Minnesota & Oregon Land & Timber Company, desired to purchase. Plaintiff, E. Z. Ferguson, was a stockholder in the plaintiff corporation, and conducted the negotiations in his own name, but disclosed to the defendant the fact that he was proposing to purchase the lands for the plaintiff corporation. The negotiations were carried on between said Ferguson and Henry Hewitt, Junior, president of the defendant, and consisted of oral conversations and written correspondence. It was finally agreed that the defendant would sell the lands to Ferguson for the sum of \$12,800.00. The head office of the defendant corporation was at Tacoma, Washington, and it was agreed that the defendant should execute a deed conveying to Ferguson the lands, and should send such deed to the Astoria National Bank of Astoria, Oregon; that Ferguson should have an abstract made of the lands, and if it appeared that the title of the defendant was perfect thereto, he should pay the sum of \$12,800.00 into the bank and take delivery of the deed. The deed was executed pursuant to that agreement, and by the president of the corporation forwarded to the bank, with instructions to deliver the same to Ferguson upon his payment to the bank, for the defendant corporation, the agreed purchase price. No time was stated within which the purchase price should be paid. The deed was sent to the bank on the 22nd day of December, 1905. A letter transmitting it read as follows:

“Astoria Natl. Bank,
Astoria, Ore.

Please deliver the enclosed deed of lands in 6/6 West to E. Z. Ferguson for \$12,800, net to us, in Tacoma funds. We have notified Mr. Ferguson and he will probably call for the deed at an early date.

Yours truly,
H. HEWITT, Jr.”

12-22-1905.

On the same date, Henry Hewitt, Jr., by letter notified Ferguson that, “We have today sent deed for lands to Astoria N. Bk., which they will deliver to you on payment of \$12,800.”

On the 3d day of January, 1905, Ferguson paid to the Bank \$12,800. On examination of the deed, however, it appeared that the land was described as being in Township 6 *South*, instead of Township 6 *North*. Ferguson notified defendant of the error by letter, bearing date, January 3, 1906, and on January 5, 1906, the defendant, through its president, wrote Ferguson a letter saying:

“I have written Astoria Nat. Bk. to return deeds, and as you suggest will make out new ones.
* * * Advise bank to return deed.”

As stated in his letter to Ferguson, the president of the defendant, on January 5th, wrote to the bank, saying:

“The Hewitt Investment Co. or H. Hewitt, Jr., sent you some time ago deeds to deliver to E. Z. Ferguson on payment of \$12,800, I think. The

deeds are faulty, it seems, and Mr. Ferguson wants them changed. You will please return them and oblige,

Yours truly,

Hewitt Investment Co.,

By Henry Hewitt, Jr., Pt."

Ferguson, as requested, asked the bank to return the deed, and thereupon the bank returned the deed as requested. The defendant did not, however, substitute a new or corrected deed, but afterwards declined to carry out the contract. The money was left on deposit with the bank as a tender until this suit was instituted. The case was tried before District Judge Wolverton, and a decree was entered in favor of the plaintiff.

ARGUMENT.

In their bill of complaint the plaintiffs contend that upon a deposit of the deed in the bank and the payment of the money into the bank for the defendants, the title to the property passed to Ferguson, but aver that if the court shall hold otherwise then that the correspondence, in connection with the deed, constitutes a sufficient contract to entitle the plaintiffs to a specific performance. The plaintiffs therefore pray that they be decreed to be the owners of said real estate, the legal title thereto being in plaintiff, Ferguson, but if the court shall hold the title not to have passed to the plaintiff, Ferguson, then that the defendant be required to perform the contract and convey the premises in conformity thereto. In discussing this case, we shall contend:

1. That the deposit of the deed in the bank in the circumstances, constitutes an escrow, and the title passed to the grantee therein named, subject to his compliance with the conditions of the escrow.

2. That the correspondence between the parties sufficiently states the terms of the contract, the price to be paid, and refers to the lands so that they may be identified, and therefore constitutes a contract that satisfies the statute of frauds and one which a court of equity will enforce.

3. The conditions of an escrow need not be evidenced by writing, but may be established by parol testimony.

I.

CORRESPONDENCE.

We first invite the attention of the Court to the correspondence between the parties, which was as follows:

On the 24th day of July, 1905, Ferguson wrote to the defendant the following letter:

Astoria, Oregon, July 24, 1905.

"The Hewitt Investment Co.,

Tacoma, Wash.

Dear Sirs:—

You will remember that I have corresponded with you and also had a personal interview with your Mr. Hewitt some time since, in regard to the four claims that you own in 6/6, but at that time the price that you were asking for this land, was more than our parties would pay. I notice from the plats in my office that you are the owner of quite

a little bunch of land in $5/3$ and $5/4$, Columbia Co., and I would like to know if you would consider a proposition to trade your 4 claims in $6/6$ for four claims adjoining the land that you own in Columbia Co., providing, of course, that the land was as well timbered with as good a quality of timber. Our information on this subject shows the timber to be about the same in both localities.

Hoping you will favor me with an early reply on this subject,

Yours truly,

E. Z. Ferguson."

To this the defendant, through Henry Hewitt, its President, replied by endorsing at the foot of the foregoing letter the following, and returning the same to Ferguson:

"Yours received on my return. I hardly care to trade lands. I might sell the whole bunch at \$20.00 per acre. It is heavily timbered, will average from 6 to 9 M per claim. One claim somewhat burnt.

Yours,

Henry Hewitt, Jr."

Negotiations were then continued orally, and the testimony of Mr. Ferguson, which in the following respects is undisputed, shows that the company agreed to sell the four claims for \$20.00 per acre, or \$12,800.00, and that it was agreed that the defendant should execute and forward the deed from Tacoma, Washington, to the Astoria National Bank, of Astoria, Oregon, and that Ferguson should have an opportunity to inspect the same and see that the title was perfect, when he should

pay the money to the bank for the defendant. Pursuant to that agreement, on the 22nd day of December, 1905, Henry Hewitt, Jr., president of the defendant, forwarded to the Astoria National Bank a deed conveying to Ferguson the lands in question. The letter enclosed with the deed to the bank was as follows:

“Astoria Nat. Bank,
Astoria, Ore.

Please deliver the enclosed deed of lands in 6/6 West to E. Z. Ferguson for \$12,800.00 net to us in Tacoma funds. We have notified Mr. Ferguson and he will probably call for the deed at an early date. Y’rs truly, Henry Hewitt, Jr.
12-22-1905.”

On the same day, Henry Hewitt wrote to Ferguson the following letter:

Tacoma, Dec. 22, 1905.

“E. Z. Ferguson,
Dr. Sir—

We have today sent deed for lands to Astoria N. Bk. which they will deliver to you on payment of \$12,800.00.

I will send you a check for commission when money is received of $2\frac{1}{2}$ per cent.

Our directors will not allow more, and in fact did not like to deed the land at all. We consider this land worth 30,000. However, if you can find us the land you promised, will send my son or another good cruiser to look over the lands & in some way make good my promise to you. Now hustle & find the other land. It must be comatable & good logging chance finally.

Yrs,
Henry Hewitt.”

On December 22, and before Ferguson had received notification of the forwarding of the deed to the bank, he wrote to Henry Hewitt, Jr., the following letter:

Astoria, Oregon, Dec. 22d, 1905.

"Henry Hewitt, Jr.

Tacoma, Wash.

Dear Sir:—

I have just completed the abstracts for your land, but have not yet given them to the attorney. I have, however, looked them over myself and find one matter that needs attention. There are four deeds to the Hewitt Investment Company, and each is signed Lester B. Lockwood, Hattie M. Lockwood by Herbert S. Griggs, her attorney in fact, and we do not find any power of attorney of record from Hattie M. Lockwood. Please inform me if you have the P. of A. *and if so send it with your deed to the Bank*; if not, can you get a deed from her? If the attorney finds anything else will let you know, but I do not think there is anything else. Of course you are aware that in Oregon the wife has a dower and her signature is more important than in Washington.

"Up to this time I have been too busy to send you the map of the other land, but will do so soon. There is quite a little work to make it up.

When can I expect the deed?

Yours truly,

E. Z. Ferguson,

179 11th Street."

On the 3rd day of January, 1906, Ferguson wrote to defendant the following letter:

Astoria, Oregon, Jan. 3, 1906.

"Hewitt Investment Co.,
Tacoma, Washington.

Gentlemen:—

On Dec. 26th I wrote you in regard to the title of your land which I am purchasing, stating that there was lacking in the title a power of attorney from Harret M. Lockwood to Herbert S. Griggs, but up to this time, have no reply. My attorney has examined the abstract in regard to this title, but in addition to the power of attorney which is lacking, he finds two other matters which need attention.

In the deed, which you sent here, the description reads T. 6 S., instead of T. 6 N., also it does not appear that the Hewitt Investment Company has complied with the Oregon laws governing foreign corporations. I think *for your own protection*, that you would wish to straighten up this last matter on account of your other land in Oregon.

I do not know how seriously this affects the title, but think it would be better if it was straightened up. I have today deposited in the Astoria National Bank the sum of \$12,800.00, the sum to be sent to you in Tacoma exchange when the title to this land is made perfect to me. I do this so that you will understand that I am not endeavoring to gain time, *but am ready and willing to take over the deal whenever it is in shape for delivery.*

In regard to the commission of $2\frac{1}{2}$ per cent, as mentioned in your letter, I think it was thoroughly understood between myself and Mr. Henry Hewitt that I was to have the 5 per cent, and I think of course that I should have it, but if the company absolutely refuses to allow me more than $2\frac{1}{2}$, *I will, of course, take the lands anyway.* You can inform Mr. Hewitt that I will probably send him today or tomorrow maps and data regarding the other timber proposition that I talked with him about. I think that one of them at least will appeal to him. Trusting you will favor me with an early reply. Yours truly.

E. Z. Ferguson."

On the same date, namely January 3, 1906, Ferguson wrote to Henry Hewitt, Jr., the following letter:

Jan. 3, 1906.

"Henry Hewitt, Esq.

Tacoma, Washington.

Dear Sir:—

This morning I wrote to the Hewitt Investment Co., which letter you will undoubtedly receive about the same time as you receive this, and at noon today, I received your letter of the 2nd, to which I hasten to reply. I think, in order to get this matter straightened up with the greatest possible speed, it would be best for you to prepare a new deed making it just the same as the former deed, excepting to state that the land is all in T. 6, N. R. 6 W. W. M. instead of T. 6 S. as it now reads.

It is evident from the deed in the bank that you

have a copy and can see how this mistake occurred. This deed you can send to the bank to be substituted for the one that is now in their hands.

If, at the same time, you have an original power of attorney to Mr. Griggs from Harriet M. Lockwood, it could be sent over and recorded in this county, if you haven't the original, you can have a certified copy made from the records there which will answer the same purpose, but before doing this, I would suggest that you examine the power of attorney carefully and see if it conveys sufficient power to enable Mr. Griggs as her attorney to convey land in Oregon, otherwise, it would be of no use and it would be necessary to obtain a deed direct from Mrs. Lockwood. Under the Oregon laws, the wife's interest is absolutely necessary to have. We are very particular in regard to our titles, because we expect to sell this land some day and do not wish to have any trouble when the time comes.

In regard to the Hewitt Investment Company's having failed to comply with the Oregon laws governing foreign corporations, *we will not let this delay the deal*, but will take it for granted that you will straighten it up at your leisure, but would like to know, when you write me, the exact amount of the company's incorporated capital.

Thinking it possible that you may not be fully informed as to the Oregon laws, I inclose you herewith some circular matter that I have received from the Secretary of State as I happen to have a surplus of them on hand.

Trusting that you will find the power of attorney all O. K.

Yours truly,

(Signed) E. Z. Ferguson.

P. S. In regard to the commission of $2\frac{1}{2}$ per cent instead of 5 per cent as you agreed, I hardly think that you should cut me off from this, as it was thoroughly understood between us, and I believe that after you have considered the matter fully, that you will persuade the company to allow it. However, in any event, we want the land whether the company will allow us 5 per cent or not. I am enclosing you under separate cover, one of the propositions that I talked about when I was in your office.

EZF.

On January 5th, Henry Hewitt wrote in response to the last letter of Ferguson, as follows:

Tacoma, Jan. 5th, 1906.

"E. Z. Ferguson,
Dr. Sir.

Your favor Jan. 3 received. I have written Astoria Nat. Bank to return deeds and as you suggest will make out new deeds. Mr. Griggs has the old Hattie Lockwood deeds signed by him as Power of Atty. and will send new deed for her to sign. It may take some little time.

Abt the commission the Co. sometime ago passed resolutions to only allow $2\frac{1}{2}$ commission for sales of lands of which I was not informed & besides this when I brought the matter up the directors

all but myself were against selling & would not have consented at all only to accommodate me.

I should have brought the matter up. Of course you know what—any officers promise is only good for his best endeavors to cary our his promises—You are mightly lucky to get the land at all. Now abt the Oregon Populistic Law we think its absolutely unconstitutional and this land was deeded to Hewitt Investment Co. before this law came into effect & we have done no business since in fact I did not know of the law or its provisions I intend to convey other lands to H. Hewitt, Jr and do no more business in Hewitt Investment Co.—will that do or do you advise me to comply now with the law—the Co is incorporated for \$50,000—37,000 paid in and its lands mostly in Washington.

How much and to whom should this be paid to I suppose its a state law. Now about those lands you send me descriptions? The Red & Black look good providing the mill gets rates to Eastern Points same as Portland—Do the Oregon Short lines assume this extra rates. If Hammond owns this Road evidently he has already bottled up this Poor Mill Co. You say timber can be bought for 30c he charges them \$2.00. How is this & what will he do to us if we buy that other timber & will he not also bottle us up—What is the quality of timber. Is it old growth Yellow fir & high land spruce is there any Cedar etc. & how abt quality. How much Hemlock & what will that cost if anything—& dont you know of something better that we should have a

fine chance to succeed if we operate in competition with Portland.

Yrs.

Henry Hewitt.

Advise Bank to return deeds.

Hewitt."

On the same date, January 5th, the following letter was sent by the defendant to the Astoria National Bank:

"Astoria Nat Bank

Gentlemen:—

The Hewitt Investment Co or Henry Hewitt sent you some time ago deeds to deliver to E. Z. Ferguson on payment of \$12,800 I think. The deeds it seems are faulty & Mr. Ferguson wants them changed. You will please return them & oblige.

Yrs truly,

Hewitt Investment Co.

By Henry Hewitt, J. Pt."

Here we have a correspondence which fully discloses all the terms of the contract, particularly when taken in connection with the deed which was sent to the bank. The first letter, namely that of July 24, 1905, from Ferguson to the defendant states that: "You will remember that I have corresponded with you, and also had a personal interview with your Mr. Hewitt some time since in regard to the four claims that you own in 6/6, but at that time the price that you were asking for this land was more than our parties would pay." He then proposes an exchange of certain other properties for "the four claims that you own in 6/6." This letter was answered by Hewitt by writing a note at the foot thereof

as follows: "Yours received on my return. I hardly care to trade lands. I might sell the whole bunch at \$20.00 per acre. * * *"

Ferguson testifies that the lands in 6/6 were the lands described in the deed and which he gives the particular description of in his testimony. The next letter in order of time is that one written by Hewitt to the Astoria National Bank in which he says: "Please deliver the enclosed deed of lands in 6/6 west to E. Z. Ferguson, for \$12,800.00, net to us, in Tacoma funds. We have notified Mr. Ferguson and he will probably call for the deed at an early date." Here is a writing referring to the land as being in 6/6, and referring to the deed containing a perfect description of it, and stating the price which is to be paid therefor.

On the same date, namely Dec. 22, 1905, Hewitt wrote to Ferguson stating: "We have today sent deeds for lands to Astoria Nat. Bk. which they will deliver to you on payment of \$12,800.00."

We therefore have in writing, first, an offer to purchase the lands in exchange for other property, and an answer declining to trade, but expressing a willingness to sell the lands for \$20.00 per acre; that is to say, sell the "4 claims in 6/6." As commonly understood, a claim is 160 acres, and it is well known that the figures 6/6, as used in the correspondence, means the land in Township 6 N., of Range 6 West. A reference having been made to the deed, it is perfectly proper, in order to secure a full description of the lands, to refer to the deed, and there we find four quarter sections of land in Township 6, North of Range 6 West in Clatsop County, Ore-

gon. It is true that by mistake the deed described the land as being in Township 6 South, but it stated that the land was in Clatsop County, and there is no such range as 6 South in that county, hence, it was quite evident, and quite clear from the correspondence, and the writings, which passed between the parties, what land it was the defendants proposed to sell and the plaintiffs proposed to purchase. The purchase price is also named in the writings, and therefore we have a complete note or memorandum in writing, describing the premises to be sold and expressing the consideration to be paid, signed by the party to be bound.

That the description of the lands was as described in the deeds, save that they should have been described as being in Township 6 North, instead of Township 6 South, is also made quite clear from the correspondence. For that fact is pointed out to the defendant in the letter of Ferguson of January 3, 1906, and also in the letter of January 3, 1906, to Henry Hewitt, president of the defendant, in which letter Ferguson states that "It would be best for you to prepare a new deed, making it just the same as the former deed, excepting to state that the land is in T. 6 N. R 6 W. W. M. instead of T. 6 S. as it now reads."

In response to that letter, Hewitt wrote Ferguson on January 5th, saying, "Your favor Jan. 3 received. I have written Astoria Nat. Bk. to return deeds and as you suggest, will make out new deeds. * * * Advise bank to return deeds."

Here we have again a complete reference to a perfect description of the land to be sold, and an agree-

ment to correct the deed, and also a recognition of the fact that it was necessary for Ferguson to consent to the return of the deed by the bank before it could be returned, for Hewitt concluded his letter, as we have seen, by stating, "Advise bank to return deed."

On the same date the defendant, Hewitt Investment Co., wrote to the bank, saying, "The Hewitt Investment Co. or Henry Hewitt, Jr., sent you some time ago deeds to deliver to E. Z. Ferguson, on payment of \$12,800.00, I think. The deeds, it seems, are faulty, and Mr. Ferguson wants them changed. You will please return them and oblige. Hewitt Investment Co. by Henry Hewitt, Jr. Pt."

Thus, it will be seen a complete statement of the contract and the terms, the description of the land and the price to be paid are contained in the writings, and the plaintiffs did not have to, nor did they depend on oral testimony to establish the terms of the agreement.

II.

WHAT CONSTITUTES AN ESCROW?

In *Watson v. Coast*, 14 S. E. 249 (35 W. V. 463), it was said:

"A deed delivered to a third person to be delivered to the purchaser on the happening of a contingency, or the performance of certain conditions on his part is a deed delivered in escrow."

Numerous authorities are cited in the opinion in support of the statement above quoted.

In *Hargood v. Harley* (S. C.) 8 Rich. Law 325-328, it is said:

“An escrow is defined to be a deed delivered to a third person, to be a deed of the party on a future condition. It is to be delivered to a stranger, mentioning the condition, and has relation to the first delivery.”

In *Patrick v. McCormick*, 10 Neb. 1, 4 N. W. 312-314, it is said:

“An escrow is a conditional delivery to a stranger to be kept by him until certain conditions are performed, and then to be delivered to the grantee.”

In *Jackson v. Catlin*, 2 Johns. 248-259 (3 Am. Dec. 415), it is said:

“A deed is delivered as an escrow when the delivery is conditional; that is, when it is delivered to a third person to keep until the thing be done by the grantee—and it is of no force until the condition is fulfilled. *The condition may consist in the payment of money*, as well as in the performance of any other act.”

It appears from the testimony, and it is the undisputed testimony, that the deed was sent by the defendant to the Astoria National Bank at the request of Mr. Ferguson, and that Ferguson was to have an opportunity to inspect the deed, examine the title, and if the title was found perfect, then he was to pay the money and take the deed.

On page 125 of the transcript of record, Ferguson's testimony appears as follows:

“I think I requested Mr. Hewitt to send the deed to the Astoria National Bank. This request was made when I was in Tacoma at the time we

made the bargain for the lands * * * I told him the abstracts would have to be made, and if we found the title alright, we would pay the money. I dont know as there was any special agreement as to the conditions under which the money was to be paid into the bank. Mr. Hewitt was to send the deed over. We would have the abstract of title, and when the title was perfect, we would pay the money and take the deed."

This testimony is absolutely uncontradicted and must therefore be accepted as a fact.

If corroboration were required, however, we find it in the correspondence, for in the letter of Ferguson to Hewitt, Dec. 22d, 1905, (Pg. 82 of Transcript) the writer stated that he had "just completed the abstracts for your land. * * * We do not find any power of attorney of record from Hallie M. Lockwood. Please inform me me if you have the P. of A. and if so *send it with your deed to the bank.* * * * When can I expect the deed?"

This is positive evidence that an agreement had already been made that the deed should be sent to the bank and the title made perfect, as Ferguson testified. It is then a fact established by uncontradicted evidence that the deed was sent to the bank pursuant to agreement between the parties. The bank was not the agent of defendant, but a stranger selected by agreement of the parties to the deed and the deposit of the deed in the bank constituted an escrow.

III.

CONDITIONS OF AN ESCROW NEED NOT
BE EVIDENCED BY WRITING.

That the conditions of an escrow need not be evidenced by writing, we think, is clearly established by the very great weight of authority. Thus, at page 343, Volume 11, Amer. & Eng. Enc. of Law, (2d Ed.), the rule is stated to be:

“It has been said that some of the earlier authorities evidently contemplate that all escrows should be evidenced in writing. But the rule supported by the prevailing modern authorities, is to the effect that it is not necessary that the condition upon which the instrument is delivered in escrow be expressed in writing; it may rest in parol or be partly in writing and partly oral, and may hence be proved by parol.”

and such is the rule adopted and observed by the Courts of this state.

In *Gaston vs. City of Portland*, 16 Or. 255, it was held that the conditions of the escrow may be established by parol and further that it is not necessary that it be agreed between the parties that the deed is deposited in escrow but that the Court will look into the facts and if the facts justify the inference that it was intended to be deposited in escrow, the Court will hold that it was so deposited. Now the case last mentioned was where the plaintiff, Gaston, proposed to the City of Portland to deed to it and dedicate as a street, a certain tract of land, provided the City would extend the street through the

property of one Kamm so as to give the plaintiff a highway to the City. There was no writing other than the deed itself, which was made out to the City and deposited with a stranger, or third party, and the question was whether or not there had been such a delivery as would pass the title and operate as a dedication. The Court held that this deposit was an escrow and that the conditions thereof might be shown by parol. At page 261, the Court said:

“The intent of the grantor must govern, and this is to be derived from all the facts, circumstances, and proof. Nor is it necessary that the condition upon which the deed is delivered in escrow be expressed in writing; it may rest in parol, or be partly in writing and in part oral. The rule that a contract in writing *inter partes* must be deemed to contain the entire agreement or understanding has no application in such case. (Stanton v. Miller, 58 N. Y. 193).”

It follows from the foregoing that the facts establish that the deed was deposited in escrow, for it was agreed that it should be deposited in the bank and that it was deposited in the bank pursuant to the agreement between the parties is not disputed. Indeed the terms may be said practically to be expressed in writing, for the letter written by the President of the corporation, Henry Hewitt, December 12th, 1905, enclosing the deed to the bank says:

“Please deliver the enclosed deed of lands in 6/6 West to E. Z. Ferguson for \$12,800.00 net to us in Tacoma funds. We have notified Mr. Fer-

guson and he will probably call for the deed at an early date.

Y'rs truly,

Henry Hewitt Jr.

12-22-1905."

Here is a letter, subscribed, it is true, by Hewitt and not by the defendant, but it is clearly proven, indeed, is admitted that during all the time the negotiations proceeded, he was the President and principal owner of all the stock of the defendant. The deed was then deposited in escrow and could not be withdrawn except by the consent of both parties. That such is the law is stated in Volume 11, Amer. & Eng. Enc. of Law (2d Ed.), page 344, in the following language:

"Where an instrument has been placed in escrow the transaction constitutes a contract between the parties, and such contract cannot be rescinded by the depositor alone. He cannot withdraw the escrow from the hands of the depositary at his will and without the consent of the other party, or without default in the performance of the condition. Nor can he, by subsequent instructions to the depositary, change the original transaction as where he directs the depositary to hold the instrument until conditions not mentioned in the original agreement have been performed."

It follows that the agreement of the parties that it may be withdrawn for the purpose of being corrected so as to conform to the contract and correctly describe the land, did not divest it of its nature as an escrow and in equity it will be deemed and held to be still in escrow.

In Volume 16, Cyc., Page 570, it is said:

“When the valid deposit of an instrument as an escrow has once been made, neither party can revoke without the consent of the other.”

In *Grove vs. Jennings*, 46 Kan. 366, a deed was duly executed by the grantor and deposited in a bank to be delivered to the grantee upon the payment of the purchase price. The defendant redelivered the deed to the grantor without the authority of the grantee and the grantor conveyed the land to other parties. The time had not expired within which the grantee was allowed to pay the purchase money into the bank and become entitled to possession of the deed, hence the court held that the redelivery was unauthorized and without effect. At page 369, the Court said:

“It is next claimed that the findings and judgment of the court below are not sustained by the evidence. This we regard as the most serious question in the case. The evidence established the fact that Grove had been negotiating for the purchase of the lot in controversy before the defendant in error purchased it, and that he had knowledge of such negotiations. He understood that a deed had been executed by Coplin and wife to Grove for this lot, and deposited in a bank at Anthony; that this deed had been withdrawn from the bank by Coplin, and Grove’s name had been erased and his own name inserted. The consideration had, also, been changed from \$175 to \$375. There was no evidence to establish the fact that the withdrawal and these erasures were authorized by Coplin and wife, or either

of them. There was no evidence to show that the redelivery by the bank to Coplin was authorized. The record is silent as to the conditions upon which the deed was to be delivered to Grove by the bank; it is not disclosed that the time had expired within which Grove would have been entitled to the deed by paying the consideration. There is no evidence to show Grove's consent to the redelivery to Coplin. Where a deed has been delivered as an escrow, subsequent instructions by the grantor to the depositary cannot change the original nature of the transaction. (*Robbins v. Magee*, 76 Ind. 381; 6 Am. & Eng. Enc. of Law 863.) If Grove had fulfilled the conditions upon his part, the title would have vested in him without further delivery. The contract upon the part of Coplin and wife had been executed; the title had passed from them, subject only to the performance of the conditions upon the part of Grove. (*Farley v. Palmer*, 20 Ohio St. 223). Now, without some evidence to show that the redelivery of the deed was authorized, and that he was lawfully entitled to it, we do not think there is sufficient evidence to uphold the findings and judgment of the trial court, and therefore recommend that the same be reversed."

Cannon vs. Handley, 72 Cal. 133. In this case, the plaintiff, Cannon, on December 8th, 1883, entered into an oral agreement with the defendant Handley for the purchase of a certain lot, and pursuant to oral agreement, the deed was placed in the hands of one Cox, the attorney who drew it, to hold until Cannon should pay

to him the purchase price, \$1100.00. "No definite time was agreed upon or stated when the purchase money should be paid or the deed delivered." It was therefore to be done within a reasonable time. On the same day that the deed was executed, Handley delivered to the wife of Cannon a key to the house on the lot, which house was vacant. The purchase money which was to be paid to Cox was to be used in satisfying a certain mortgage, the satisfaction of which, by written instrument, executed by the mortgagee, was placed in the hands of Cox at the same time that the deed was delivered to him. On December 10th, Handley, by deed then executed, conveyed the lot in question to his brother, Thomas Handley, and Thomas paid the \$1100.00 to Cox, who delivered to him the release of the mortgage, which he placed of record. Thomas demanded of Cox the deed executed to Cannon, and placed in escrow as aforesaid, but Cox refused to deliver it. On the morning of December 11th, Cannon's wife, who had been acting as his agent in the entire transaction, stated to Cox that she had heard that the father of Handley, the grantor, had some claim to the property, and instructed Cox not to forward a certain order or pass book which she had delivered to him for collection as part of the money to be used in payment of the \$1100.00, until "she knew about the title." Thomas placed his deed on record and Handley, who had executed the deed to Cannon, repudiated the transaction, but the Court held that the delivery of the deed was a delivery in escrow and also held that that act could be proven by parol and that specific performance could be enforced. At page 144, the Court said:

"It is said the contract was oral, and should not

be enforced. But the deed is a note or memorandum in writing of the contract, and subscribed by the party charged, and this satisfies the statute. (Code Civ. Proc. Sec. 1973; Civ. Code, Sec. 1624, Subd. 5.) Here it is signed by the party to be charged, and there is mutuality. (Worrall v. Munn, 5 N. Y. 229; Rutenberg v. Main, 47 Cal. 213.) In Cagger v. Lansing, 47 Barb. 421, the question is decided and properly decided, that the deed is sufficient evidence to take the case out of the statute of frauds. So held under the statute of New York, which is substantially the same as that in force in this state. But it is said there was nothing in writing authorizing Cox to hold or deliver the deed. There is nothing in the statute which requires this to be in writing. The statute only requires a note or memorandum in writing as evidence of the contract. Nothing in it has reference to any arrangement for the delivery of the deed in escrow, or its subsequent delivery by the party so holding it to the grantee. The contract is fully proved herein by writing."

IV.

THE FACT THAT THE PLAINTIFF FERGUSON REQUESTED CERTAIN MATTERS PERTAINING TO THE TITLE TO BE CLEARED, DID NOT AFFECT HIS ACCEPTANCE OF THE OFFER TO SELL NOR PRECLUDE HIM FROM THEREAFTER WAIVING SUCH OBJECTIONS AND DEMANDING THE DEED.

It will be recalled, and it should be kept in mind,

that on the third day of January, 1906, Ferguson paid into the bank where the deed had been deposited, the full sum of \$12,800.00. It is true that he notified the bank not to pay it over until certain defects, or apparent defects in the title to the property had been corrected, namely,

(a) Correction of the deed so that it should read Township 6, North instead of Township 6 South;

(b) Recording of a certain Power of Attorney or production of the original, and,

(c) Compliance by the grantor, the defendant herein, as a foreign corporation, with the laws of the State of Oregon.

There was nothing in these objections or suggestions inconsistent with the terms of the escrow, but on the contrary, they were entirely in line therewith and in conformity thereto. It is presumed that the grantor intends to give a perfect title, and as we have seen, a condition of the escrow was that title should be made "perfect" in Ferguson.

However, Ferguson did not insist thereafter on any of these objections other than the correction of the deed, which the defendants specifically undertook to do, both in a letter to Ferguson and in a letter to the bank. The letter to the bank was written in the name of the defendant and by it subscribed, while the letter to Ferguson was written by the President of the defendant and in both letters it was proposed to correct the deed, and in none of the correspondence which followed, was there any objection whatever made to complying with the suggestion of Mr. Ferguson regarding the Power of Attor-

ney. On the same date that Ferguson deposited the money in the bank, he wrote to the defendant and also to its president, calling their attention to these requirements, but specifically stating that he did not insist on the defendant conforming to or complying with the laws of Oregon; that he did not undertake to say that it was required so to do, but simply advised for its own protection that it should do so. He thereafter, as he testifies, and his testimony in that respect is undisputed, notified the defendant that he had examined the record and found that there was recorded in the State of Washington, the power of attorney in question, and that he could secure a certified copy of that which would be satisfactory and hence he waived that matter. It should also be kept in mind that the money was paid in by Ferguson to the bank and remained there until this suit was instituted.

Alexander vs. Bernard, 136 Mich. 642. The syllabus in this case is as follows:

“Deeds—Escrow—Forfeiture—Delivery.

Where deeds were placed in escrow, together with purchase-money mortgages and notes, to be delivered to the purchaser and seller, respectively, upon the payment of a stated sum at a certain time, and the payment was duly made, a demand by the purchaser that the mortgages and notes should not be delivered until the title should be cleared from incumbrances, did not prevent her from afterwards insisting upon a delivery of the deeds according to the terms of the escrow.”

In *Alexander vs. Bernard*, the deed to the property

bargained, was executed and delivered in escrow to Bernard, who was cashier of a certain bank. The grantee therein named, Alexander, was required to pay to the bank, certain money within certain times. The attorney for Alexander objected to the title and wrote to Bernard a letter, calling his attention to what he claimed were defects in the title. With the deed had been deposited a certain note and mortgage, executed by Alexander to the grantor, a Mrs. Vandercook, and in such letter he stated:

“Mrs. Alexander * * * does not consent to a withdrawal of said deeds from escrow, but, if Mrs. Vandercook demands them, instead of taking measures to have said incumbrances and tax title liens and clouds removed, and perfect the title, which said deeds declare to be free from all incumbrances whatever, and are warranted same, you can exercise your own judgment as to the delivery of them back to Mrs. Vandercook. But a recall of said deeds will be at her peril, etc.”

Some time thereafter, however, Mrs. Alexander notified Bernard that all objections to the title were withdrawn and demanded the deeds. Prior thereto, however, Mrs. Vandercook had caused a notice to be served on Mrs. Alexander to the effect that as she had objected to the title, contract was forfeited and Bernard was instructed to return the \$237.17 that had been paid to him by Mrs. Alexander on account of the purchase price and to return the deeds. At page 646, the Court said:

“The complainant never desired the notes and mortgages back nor did she desire to rescind the

contract. She made all the payments as required. It is true that, under the advice of counsel, she did for a time insist the notes and mortgages should not be delivered until the title was perfected. She never refused to take a perfect title, and, after getting other counsel, she changed her mind about taking the deeds that were left with Mr. Bernard, and offered to take them. There is nothing shown by the record to prevent her from asserting the right to a delivery of the deeds."

The case of *Regan vs. Howe*, 121 Mass. 424, is also applicable.

In this case, the grantor executed a deed and left it with the attorney who drew it, to be delivered to the grantee, upon the performance of certain conditions, namely, grantee, Howe, was to pay \$300.00 and satisfy a certain mortgage for which the grantor was responsible. It was over a year thereafter before the money was paid and the mortgage satisfied, but the grantee did both finally. Thereafter the grantor obtained possession of the deed by representing to the party who held it in escrow, that she intended to deliver it to the grantee. She never did so.

The Court said at page 426:

"There was evidence that the conditions, upon which the deed was to be delivered to the grantee, had been fully performed, so that the equitable title to it was in the grantee; that the scrivener, in discharge of his trust, intending to complete its delivery, gave it to the petitioner herself to carry and deliver to the grantee, and that she took it away de-

clarating that she took it for that purpose. That is enough to constitute a delivery, if subsequently accepted as a delivery by the grantee. It is not necessary, as between the parties themselves, even when both are present, that the deed should be placed in the actual custody of the grantee, or of his agent. It may remain with the grantor, and it will be good, if there are other acts and declarations sufficient to show an intention to treat it as delivered. The significance of the acts or declarations relied on will be greatly strengthened where the deed is placed in the hands of a third person, by the fact that the conditions upon which the delivery of the deeds depends have been fully performed. The destruction or detention of the deed by the grantor, after such delivery, cannot divest the grantee's estate."

Now applying the authorities above quoted to the case at bar, it would seem that the right of the plaintiffs to recover is clear. There was a deposit of the deed in escrow and there was a clear acceptance of the terms and conditions of the deposit. Ferguson paid promptly to the bank the \$12,800 and the questions he raised merely required the performance of certain acts by the grantor, all of which were easily within its power and which were deemed necessary to perfect the title, for instance, the fact that the deed by mistake described the land as being in 6 "South" instead of 6 North was clearly a matter that Ferguson had a right to insist on having corrected. The only other two questions raised by him were first, whether or not it was necesasry for the defendant

to qualify as a foreign corporation, but in the letter he wrote to the grantor he distinctly stated that he did not make that a condition, he only suggested it in its own interest. The other matter he inquired about was as to the existence, in point of fact, of a power of attorney which it did not appear had been recorded. The evidence is undisputed that thereafter he discovered the existence of this power of attorney and waived any objections on that score. As stated in the California case above quoted from, Ferguson never objected to taking a perfect title, and the inquiries he suggested were perfectly legitimate and proper. Here then, is a case where a deed was deposited in escrow and the conditions of the deposit were complied with promptly by the grantee and the money paid in to the bank. The deed was withdrawn pursuant to an agreement between the parties for the purpose of having the erroneous description corrected and for no other purpose. It seems clear that the plaintiffs upon the payment of the money into the bank, became the equitable owners of the lands in question, and hence are entitled to have their title thereto established by a decree of court.

V.

OTHER TIMBER LANDS.

A contention is made by defendant to the effect that the sale of the lands in controversy was conditioned on Ferguson securing for the defendant certain other lands. That this contention is entirely an afterthought is clearly demonstrable from the letters and writings that passed between the parties. For instance: On July

24th, Mr. Ferguson wrote to the Hewitt Investment Company asking if it would be willing to trade the lands in controversy, for other lands in Columbia County, being the very lands which Henry Hewitt now contends were to be secured for the defendant as a part of the deal, but to that letter, Hewitt answered as follows:

“Yours received on my return. I hardly care to trade lands. I might sell the whole bunch at \$20 per acre.”

Now \$20.00 per acre is exactly what the plaintiff finally agreed to pay, namely \$12,800 for four claims of 160 acres each, or 640 acres in all, at \$20.00 per acre is \$12,800. Negotiations continued for some time orally and by letter when finally, on December 22, as shown by the letters above set forth, Hewitt wrote to the bank enclosing the deed by the defendant to the lands in controversy with directions to deliver the same to Ferguson upon the payment of \$12,800 net in Tacoma funds, but said not one word about any other lands. On the same day, he wrote to Ferguson saying:

“We have today sent deed for lands to Astoria N. Bk. which they will deliver to you on payment of \$12,800 and I will send you a check for commission when money is received of $2\frac{1}{2}$ per cent. Our directors will not allow more and in fact did not like to deed the land at all. We consider this land worth 30,000. However, if you can find us the land you promised, will send my son or some other good cruiser to look over the lands and *in some way make good my promise to you*. Now hustle and find the other land. It must be comatible and good logging chance finally.”

Now this shows that the matter of securing the other lands was entirely a separate deal, namely, as Ferguson testifies in the course of negotiations, he had suggested that they could buy some cheap lands. It is clear from the above letter alone that the lands had not been found or located, but that a certain class of lands Hewitt wanted to buy if he could get them located just to suit him, and in that case he was evidently going to pay Ferguson a commission, for he says that he will, in case such lands are found, "in some way make good my promise to you," that is, regarding commissions. But the deed was not delivered or to be delivered on any condition that other lands satisfactory, should be found. That this was purely a separate proposition is also clearly indicated in the letter of Ferguson to the Hewitt Investment Company of January 3, 1906, above quoted in which, he concludes his letter with a discussion of the commission by finally saying, "I will, of course, take the lands anyway." Here, we may remark, is a clear, positive and unequivocal acceptance of the proposition to purchase the lands in controversy and taken in connection with the fact that Ferguson had already paid the \$12,800 into the bank should be conclusive on that matter. In this same letter, however, he further says:

"You can inform Mr. Hewitt that I will probably send him today or tomorrow, maps and data regarding the other timber proposition that I talked with him about. I think that one of them at least will appeal to him."

This shows also that the other proposition was entirely separate and had not yet been even entirely out-

lined or the location of the lands determined upon. Now, on January 5th, 1906, in a letter above set forth, Hewitt states that he has written the bank to return the deed for correction. He then proceeds to discuss the other lands, data of which had evidently reached him by that time, for he says:

“The Red and Black look good providing the mill gets rates to Eastern Points same as Portland—Do the Oregon Short Lines assume this extra rates. If Hammond owns this Road evidently he has already bottled up this poor mill.

Finally, in closing his letter, Hewitt says:

“Dont you know of something better that we should have a fine chance to succeed if we operated in competition with Portland?”

What more is necessary to show that this matter of purchasing other lands was entirely a separate proposition and was in no wise a condition of the sale of the lands in 6/6.

VI.

THE DEED WAS WITHDRAWN FROM THE BANK SOLELY FOR THE PURPOSE OF CORRECTING IT.

That such was the fact is also established by the correspondence. Thus, under date, January 5th, 1906, in the letter last quoted from Hewitt to Ferguson, the former says:

“Your letter Jan. 3 received. I have written Astoria Nat. Bank to return deeds, and as you suggest will make out new deeds. Mr. Griggs has the old Hattie Lockwood deeds signed by him as power

of attorney, and will send new deeds for her to sign. It will take some little time. * * * Advise bank to return deeds."

Now this was in response to Ferguson's letter of January 3rd written to the company, and also one on the same date written to Hewitt personally, both of which letters are above set forth. In both of these letters, Ferguson called attention to the fact that the land is described in the escrow deed, as being Township 6 South instead of 6 North. On the same date that Hewitt wrote to Ferguson saying that he would have the deed corrected, he wrote to the bank as follows:

Astoria Nat. Bank.

Gentlemen: The Hewitt Investment Company or Henry Hewitt sent you some time ago deed to deliver to E. Z. Ferguson on payment of \$12,800 I think. The deeds it seems are faulty and Mr. Ferguson wants them changed. You will please return them and oblige,

Hewitt Investment Company,

By Henry Hewitt J. Pt.

After the Company got it back, however, it changed its mind and concluded to retain it and refused to redeliver it. This is admitted in the answer.

VII.

DEFENDANTS' CONTENTIONS.

The defendants' first contention is that "the terms of the contract do not appear from the written evidence introduced.

In support of this contention and in order to make

it appear plausible, counsel for defendants, in their brief, proposed to eliminate entirely from consideration the following letters:

The letter of July 24, 1905, from Ferguson to the Hewitt Investment Company.

The letter of September 25, 1905, from Ferguson to the Hewitt Investment Company.

The letter of January 3rd, 1906, from Ferguson to Astoria Bank.

The letter of December 22, 1905, from Ferguson to Henry Hewitt, Junior.

The letters of July 24th and September 25th, counsel say, "may be laid aside having resulted in nothing." We do not agree with this contention by any means. The letter of July 24th we deem of very great importance. That letter is not addressed to Mr. Hewitt, as counsel mistakenly state in their brief on page 15, but is addressed to the Hewitt Investment Company. It calls attention to the fact that the writer "had a personal interview with your Mr. Hewitt some time since in regard to the four claims that you own in 6/6"; that the price then asked was more than his people cared to pay. The writer, Mr. Ferguson, then proposed to exchange certain lands for the 4 claims in 6/6. This letter was addressed to the Hewitt Investment Co. and was answered by Henry Hewitt, Jr., who, as it clearly appears from the evidence, was practically the sole owner of the corporation, and was its President and Manager. He answered that letter by endorsing at the foot thereof, the following: "Yours received on my return. I hardly care to trade lands. I might sell the whole bunch at \$20.00 per acre.

It is heavily timbered will average from 6 to 9 M per claim. One claim somewhat burnt."

Observe: "Yours received on my return." He was the corporation.

Here is a distinct offer to purchase and an offer to sell, and these letters constitute the opening of the negotiations. They are certainly quite important to the present inquiry, and will be found at pages 56-57, Transcript of Record.

The letter of September 25, 1905, which appears at page 130 of the transcript, was written by the plaintiff, Ferguson, to the Hewitt Investment Co. in reply to the answer last above quoted. It is important because it refers to that answer, and contains an offer of \$8000.00 for the 4 claims, shownig a continuation of the negotiations.

The letter of December 22, 1905, from Ferguson to Henry Hewitt, is of itself probably not of special importance. It shows, however, that the negotiations commenced in September, were still being continued.

The next letter to which they object is that of January 3, 1906, from Ferguson to the bank, appearing on page 48 of the Transcript. This letter is important only in showing that on receiving notice from the defendant of the fact that it had forwarded the deed to the bank, Ferguson made the deposit of the purchase price with the bank and notified it that he would take delivery of the deed exactly in accord with the terms of the escrow agreement, namely, as soon as the title was perfected. He called the attention of the bank to the fact that the land was described as being in Township 6 *South* instead of

Township 6 *North*. We think this letter important to the inquiry.

The next letter, which counsel contends should be eliminated, is that of January 8th from Ferguson to Hewitt. This letter is quite important in view of the fact that it shows that Ferguson complied with the request of Hewitt to have the bank return the deed. It should be kept in mind that by his letter of January 3rd to the Hewitt Investment Company, Ferguson called its attention to the fact that the deed did not accurately describe the land, as it described it as being in Township 6 south instead of Township 6 north, and suggested the necessity of correcting it. Whereupon, on January 5th, Henry Hewitt, Jr., answered the letter of Ferguson to the Hewitt Investment Company and stated that he had written to the bank to return the deed, saying, "as you suggest will make out new deeds," and closed the letter by requesting Ferguson to "advise bank to return deeds."

In the letter of January 8, 1906, of Ferguson to Hewitt, which counsel proposes to eliminate, Ferguson said, "Replying to your favor of the 5th, I have to say that the bank has informed me that they would return the deeds to you by tonight's mail. I suppose it will take two or three weeks to get them straightened out. In any event, the money will be left at the bank for you as soon as the title is completed." This shows not only an agreement to correct the deed, but also the fact that it was recognized by both parties as having been deposited in escrow and could only be returned by the bank pursuant

to the request of both parties, and that it was at the request of both parties that it was returned.

The letter from the bank to the Hewitt Investment Co. of January 9, 1906, on page 50 of the Transcript, which counsel for defendants contend should also be ignored, we think is important, as it also shows that the deed was returned for correction only at the request of both parties. It also shows that the \$12,800.00 was still held by the bank to be paid to the defendant when the deed should be corrected and the title made perfect.

VIII.

AS TO DEFENDANTS' CONTENTION THAT THE EVIDENCE DOES NOT PROVE THAT THE LAND WAS BEING PURCHASED FOR THE BENEFIT OF PLAINTIFF CORPORATION.

It is contended by defendant in its brief, at page 22, that there is no evidence showing that the plaintiff corporation was the real purchaser of the property, and at page 23 of the brief, it is stated that "No proof whatever of the allegations in this respect will be found in any writing to be found in the record, nor are they established by the oral testimony of witnesses at the trial.

The testimony of Mr. Ferguson was positive and direct to the point that the money, the \$12,800.00, was provided by the plaintiff corporation, and that the land was purchased for it. He also testified that he so notified the defendant during the negotiations. His testimony to that effect will be found at page 69 of the Transcript, where he testifies as follows:

"I informed Mr. Hewitt that the Minnesota &

Oregon Land & Timber Company was purchasing the land. I told him that I was a stockholder in the company, but was buying the lands for the company."

In this connection it is material to observe that several letters of both parties discuss the amount of commission Ferguson was to be allowed. If he was purchasing for himself why was he allowed a commission?

Furthermore, in the letter of July 24, 1905, which Ferguson wrote to the defendant he calls attention to the fact that the previous price which they had placed on the lands was deemed by his people too much, his language being: "At that time the price you were asking for this land was more than *our parties* would pay," which corroborates Ferguson's oral testimony that defendant understood he was representing the plaintiff corporation.

Hence, it appears that counsel are in error in contending that there is no testimony in the record in support of the averment in the bill that the land was purchased for the plaintiff corporation. That such corporation supplied the money is undisputed and must be taken as a fact proven. It is true that Hewitt denied in his testimony that Ferguson informed him that he was acting for the corporation, but, as stated, Ferguson is corroborated by his letters and the fact that he was being allowed a commission. Whether he did or not, however, we deem really immaterial, for we understand the rule to be that an undisclosed principal can take advantage of and enforce the contract of his agent. It is stated in the brief of defendant that "every one has a

right to select with whom he will contract and cannot have another person thrust upon him without his consent," and authorities are cited in support of that proposition.

That such is the general rule may be admitted, but the rule has no application to contracts made by an agent for an undisclosed principal. Section 528 of Clark & Skyles' on the Law of Agency states the rule as follows:

"It is a well settled general principal of the law of contracts, subject to some exceptions, or apparent exceptions, that a contract cannot confer rights on a person who is not a party to it, so as to enable him to sue in his own name for its breach, for a person has a right to say with whom he will enter into contracts; and it has been contended that this principal prevents an undisclosed principal from maintaining an action on a contract. The contrary, however, is now well settled on the ground that by reason of the fiction of identity of principal and agent, the undisclosed principal becomes a party to the contract through his agent."

And at Section 29 the same author says:

"The doctrine that an undisclosed principal may maintain an action on a contract is not limited to oral contracts, but applies also to contracts in writing other than contracts under seal and negotiable instruments."

IX.

INCORPORATION OF PLAINTIFF CORPORATION.

On page 23 of defendants' brief it is stated that it appears by appellee's own evidence that appellee cor-

poration was not in existence at the time of the transaction, because it is stated that Ferguson testified, as shown on page 58 of the Transcript, that "We were purchasing for the parties, who afterwards formed the Minnesota & Oregon Land & Timber Company."

Very clearly that testimony refers to negotiations had prior to July, 1905. Ferguson was speaking of purchases of lands he had been making prior thereto in the vicinity of the lands in question, from other persons. He had no reference to the negotiations for this particular land. At page 69 of the Transcript, he testifies regarding the negotiations for the lands in question that, "I informed Mr. Hewitt that the Minnesota & Oregon Land & Timber Company was purchasing the land. I told him that I was a stockholder in the company, but was buying the lands for the company."

Surely, counsel have allowed themselves inadvertently to make this apparent misrepresentation of the testimony. Indeed the incorporation of the plaintiff corporation at the time of the negotiations is admitted in the record. The allegation in the bill of complaint is:

"That the plaintiff, Minnesota & Oregon Land & Timber Company, is and at and during all the times hereinafter mentioned, was a private corporation organized and existing under the laws of the State of Minnesota, etc."

At page 74 of the Transcript of Record, it appears "that it was considered admitted that the plaintiff is a corporation and had authority to purchase the land."

As a matter of fact, the admission was broader than appears in the transcript of record, for a reference to the

transcript of testimony on file in the Court below will show that, reference being had to the plaintiff corporation, the admission was in the following words:

“It may be considered admitted that it is incorporated *as alleged* and has authority to purchase the timber.”

As above stated, it is alleged in the bill of complaint that the corporation plaintiff was incorporated during all the times therein mentioned, which covered the period of negotiations, and the admission being that it was incorporated as alleged, entirely does away with defendants' contention.

X.

CAN THE DEED BE CONSIDERED FOR THE PURPOSE OF ASCERTAINING THE TERMS OF THE CONTRACT?

It is contended by defendant that the deed which was executed and placed in escrow cannot be considered or resorted to for the purpose of establishing or ascertaining the terms of the contract. In support of this contention, counsel cite a number of authorities to which we will later on refer more specifically. An examination of these cases will disclose that they simply go to the proposition that the mere execution of the deed, pursuant to a parol agreement, is not a compliance with the statute of frauds. In other words, that a deed which does not set forth the contract is not sufficient of itself to establish the contract, so as to take a case out of the statute of frauds. Our contention is, and we think the authorities fully sustain us, that a contract which the

statute requires to be in writing, expressing the consideration and delivering the land, need not be embodied in one writing, but may be proven by any number of writings, which taken together, clearly disclose the terms of the agreement. Hence, a contract or agreement may be established by letters and written correspondence, and if reference be made in such letters or correspondence to a deed which has been executed, then such deed may be read and considered in connection therewith. This proposition we do not think any authority cited by counsel disputes. The cases cited by counsel for defendant all refer to an "undelivered deed." A deed delivered in escrow is not "an undelivered deed." The deeds referred to in the cases cited by counsel, as we shall see, had been either retained by the grantor or delivered to his agent only, and in that respect the situation differed entirely from the one we are considering. Nor do we wish to be understood as admitting that the weight of authority is that an executed deed of itself may not be a sufficient memorandum to take the case out of the statute. It is not necessary, however, for us to discuss that question, for here the deed was not only delivered in escrow but was referred to in numerous other writings signed by the parties and thereby made a part thereof.

KOPP VS. REITER, 34 N. E. 972, is the first case cited by counsel in support of their contention that the deed cannot be considered. The case does not support that contention, but, as we view it, squarely supports plaintiff's contention. It is true that the court held that the deed of itself was not a sufficient memorandum

of the contract to satisfy the statute of frauds, but at page 944, the court said:

“It is true that an undelivered deed is sometimes resorted to in order to help out the requirements of the statute of frauds, but it can hardly be said that the circumstances under which such a deed can be used are disclosed by the facts in the present record * * * Where the owner of the land has signed a certain contract of sale, *or some writing amounting to such a contract*, but has failed therein to properly describe the property, a deed executed by him, but not delivered, may be looked to as a part of the transaction and may be made to aid the prior agreement and secure its enforcement by supplying the defect in such description.”

So here, it is contended by defendant that the memorandum in writing, which consists of numerous letters passing between the parties, did not sufficiently describe the land. This is one of the propositions urged in their brief, and is stated on page 25 thereof. We think the correspondence itself sufficiently describes the land because it refers to the “four” claims owned by the defendant in “6/6.” This language is readily understood as meaning the four quarter sections owned by the defendant and located in Township 6 north of Range 6 west of the Willamette Meridian, and we have no doubt the court will so construe it. Such description was used by both parties and is contained in the letter written by the defendant to the bank in transmitting the deed, as appears at page 47 of the transcript. In that letter,

the president of the corporation defendant said, addressing the bank: "Please deliver the enclosed deeds of lands in 6/6 West to E. Z. Ferguson for \$12,800 net to us, in Tacoma funds. We have notified Mr. Ferguson and he will probably call for the deed at an early date."

On the same date, the same party wrote to Ferguson calling his attention to the fact that the deed had been sent to the bank. This correspondence brings this case clearly within the rule above quoted from Kopp vs. Reiter, for it is a case "where the owner of land has signed a written contract of sale, or some writing amounting to such a contract," and if it be true that the writings so signed, namely, the letters, do not describe the land accurately, then, to continue the quotation, "a deed executed by him, but not yet delivered, may be looked to as a part of the transaction * * * * * by supplying the defect in such description."

WIER VS. BATDORF, 38 N. W. 22.

This is the second case cited by counsel and is equally inapplicable in support of their contention, and equally applicable in support of our contention. In this case, the contract for the sale of the real estate was entered into by parol, and a deed was made by the grantor and left in the hands of *his* agent to await the arrival of the money of the grantee. It was held that there had been no delivery of the deed, and that it was not available as a memorandum of the contract.

The court considered and commented on the case of Thair vs. Luce, 22 Ohio, St. 62, saying:

"It will be observed that in the case cited the

memorandum was sufficient except in failing to describe the property sold, and the court treated the acceptance of the terms of the deed by Fuller as the completion of the contract and as identifying the property sold."

The court then quoted from the Ohio decision showing that the Ohio court had looked to the deed for the description of the premises; the memorandum in writing failing to give the description. Thereupon, at page 4, the court said:

"If the facts in the case under consideration brought it within the facts of the Ohio case, we would have no hesitancy in enforcing the contract."

Thus the court held in *Weir vs. Batdorf*, as did the court in *Kopp vs. Reiter*, that if there existed a question as to the sufficiency of the description in the written memorandum, an undelivered deed forming part of the transaction might be considered for the purpose of ascertaining the true description.

SWAIN VS. BURNETT, 89 Cal. 564, is the next case cited and all that was held in that case was that "An undelivered deed executed in pursuance of an oral agreement of sale cannot be regarded as *sufficient* memorandum to satisfy the statute of frauds, unless it is shown to have contained a memorandum of the oral agreement." We are not contending that the deed of itself is a "sufficient" memorandum, for it is not necessary so to do in this case, but many authorities so hold, but we are contending that the deed may be considered in connection with other written memoranda.

HALSELL VS. RENFROW, 78 Pac. 118, is the next case cited in defendant's brief and is quoted from at some length. The decision is by the Supreme Court of Oklahoma. Renfrow was supposed to be the owner of a certain 40-acre tract of land in Oklahoma County, which he placed in the hands of one Shields, for sale. The authority of Shields was not expressed in any writing, and he was without authority to make a contract of sale; his sole authority being to procure a purchaser at the named price of \$10,000.00. Renfrow lived in Missouri. Shields offered the property to Halsell, who agreed to take it at the price named, and paid Shields \$500.00 on account of the purchase price. Whereupon, Shields notified Renfrow by wire, that he had "sold the 40 acres, \$10,000.00 cash, \$500.00 forfeit." To this wire Renfrow replied, "I confirm sale by you, \$10,000. \$500.00 forfeit." Thereafter, Renfrow went to Oklahoma and met the plaintiffs and all subsequent negotiations were carried on personally and orally. It was discovered that Renfrow had conveyed a portion of the property to one Compton, had made a lease of the entire tract to one Springstine, who was in the actual possession and refused to surrender. Renfrow proposed to deliver the deed for all except the Compton lot, for which he proposed to make a deduction of \$200.00 from the purchase price, and give such present possession thereof as he had, and full possession as soon as he could obtain it, or pay the expense of an action to secure possession from Springstine. Halsell agreed to the \$200.00 deduction, *but refused to take the deed, or pay the pur-*

chase money unless Renfrow would give him possession at once. Renfrow then returned to Missouri without agreeing to deliver possession at once. From Missouri he wrote to Halsell stating that he had mailed to the Western National Bank a deed to the tract of land, and had "instructed the bank to turn the same over to Halsell upon the payment of \$9500.00 for Renfrow and \$500.00 to the credit of Shields, and stated that "I shall expect this to be done between banking hours on Wednesday, the 27th inst. * * * * I have concluded that I will bring this matter to a close at once, and shall give you the opportunity of taking up the deed on Wednesday or will consider the proposition at an end."

Thereupon, on the 27th, Halsell tendered to the bank \$9800.00, conditioned upon the delivery of the deed, and *immediate possession* of the premises, and the bank refused the tender. Thereupon, Halsell wrote to Renfrow reciting what he had done and demanding delivery of the deed, and immediate possession of the land. Renfrow answered, stating in substance, that Halsell well knew that he was unable to give immediate possession, and that he could not undertake to do so, and thereupon terminated all negotiations. It will be seen that Halsell and Renfrow never reached a definite agreement. Halsell constantly demanded immediate possession and Renfrow, being unable to give it, as constantly declined. The Supreme Court of Oklahoma held that the writings did not constitute a sufficient memorandum to take the case out of the statute, and also held the parties never reached a definite agreement as to the terms of the sale.

It was intimated by the Oklahoma Court that the deed could not be looked to for the description, but this proposition seems not to have been definitely decided. The court simply said: "While there are a few cases holding that an undelivered deed may be looked to to supply a description, they are cases where there had been an exchange of lands, and one or both parties had taken possession, but the general rule is that an undelivered deed forms no part of the transaction, and cannot be looked to to supply any omission in the writings that have passed." The court thereupon cited several cases in support of that statement, no one of which supports it, all being cases where there was no writing other than the deed, and not one of the cases, so far as we have been able to discover, asserts the doctrine that in no circumstances can a deed be considered in connection with other contemporaneous writings. The court concludes that branch of the case by saying: "But in view of the particular facts in this case, we do not deem it important whether this deed could or could not aid the agreement. It is a conceded fact that the description in this deed was not a correct one, and both parties repudiated it. It embraced the Compton lot. * * * * * The further contention is made that the deed sent to the bank by Renfrow contained a correct description, and that it can be looked to to supply the description. If this could be permitted under the authorities cited, *supra*, it would not entitle plaintiffs to recover in this action. If the writings alone are to be held as sufficient memorandum to take the agreement out of the statute of frauds, and

we do not think they do, then it would appear from such deed that the consideration to be paid was \$10,000.00, and the plaintiffs never tendered or offered to pay but \$9500.00. It is true that it is claimed that Renfrow agreed to deduct \$200.00 on account of the Compton lot being deducted from the land, but this was a parol agreement."

It will thus be seen that there were two deeds in question, one deed containing an inaccurate description, which was abandoned and withdrawn, and another deed containing a correct description, but not containing a correct statement of the purchase price. Thus, it will be seen that the court did not distinctly hold that a deed which contained a correct description of the land might not be looked to or considered in connection with other writings. However, we have no hesitancy in saying that the decision of the Oklahoma Court in *Halsell vs. Renfrow*, so far as it intimates that a deed may not be considered at all in connection with other writings relating to the same transaction (if properly construed it does so intimate), is opposed to the great weight of authority. Also, we think it quite clear that the Court was wrong in holding that the writings were not of themselves sufficient to take the case out of the statute had they shown that the parties reached a definite agreement. The case finally went to the Supreme Court of the United States, 202 U. S. page——, (50 Law. E. D. 1032). It was affirmed, but distinctly and solely on the ground that the writings showed that the minds of the parties did not meet, for while *Halsell* demanded im-

mediate delivery of the premises, Renfrow declined constantly to agree thereto. The court entirely ignored the question as to the sufficiency of the writings to take the case out of the statute.

NICHOLS VS. OPPERMAN, 34 Pac. 162, decided in the Supreme Court of Washington is next cited. In that case there was no writing expressing the contract, nor had there been any correspondence between the parties relative to the contract. It was claimed that an oral agreement of sale had been entered into and that pursuant thereto, a deed had been executed and deposited with a third party to be delivered to the plaintiff upon the satisfaction of a certain mortgage thereupon the land. The court at page 163 said:

“The condition upon which a deed is delivered in escrow may rest in and be proven by parole. This is as far as the rule extends, and it presupposes a valid contract * * *. To constitute a deed there must be a delivery to the grantee personally, or to some third person for him. A deposit of a deed with a third person, to be delivered to the grantee upon the happening of some future certain event, has been held sufficient to constitute the deed an escrow, and control of it in such a case has passed out of the grantors hands. * * * Where there exists a previous valid contract to convey, the conditions upon which the deed is deposited may rest in and be proven by parole. * * * In the case at bar, there was no written contract to convey the lands, nor had possession thereof been

transferred, so as to constitute a part performance of a parole contract to render it valid."

It will be seen that there was no writing whatever, other than the deed itself. The case went up on exceptions to the refusal of the trial court to admit oral testimony of the contract. The case was affirmed by a majority of the judges. Mr. Justice Hoyt, one of the most distinguished and able jurists the State of Washington has ever had, dissented, holding that, "The negotiations between the parties should have been allowed to be shown as tending to explain the conditions upon which the deeds were to be delivered." This statement by Justice Hoyt, we think, is clearly supported by the weight of authority, but be that as it may, the decision of the majority of the Court has no application to this case except insofar as it supports our contention that the terms or conditions of an escrow may be established by parol. It is not held that the deed may not be resorted to for the purpose of ascertaining the description of the property, or otherwise referred to in connection with other writings. It was simply held that oral evidence could not be received to show the consideration or terms of the sale.

Counsel for defendant, in their brief, constantly reiterate, as at page 30 thereof, the statement that the writings introduced in evidence "do not express the modified bargain proposed by Ferguson that the title should be perfect of record." They doubtless refer to the letters of January 3, one to the Astoria National Bank (Transcript, 48), one to the Hewitt Investment

Company (Transcript 61), and one to Henry Hewitt (Transcript 65), written by Mr. Ferguson. Reference to those letters will show that Mr. Ferguson insisted on nothing that was not warranted by the conditions of the escrow and that he proposed no "modified terms." He called attention in all three letters to the fact that the land was described as being in Township 6 South instead of Township 6 North, and he asked in the letter to Hewitt that a new deed be executed the same as the old one, excepting in respect of that description. He called attention to the absence apparently of a power of attorney and to the failure of the company to comply with the Oregon laws regarding foreign corporations. He stated distinctly, however, in his letter to Hewitt that the failure to comply with the laws of Oregon in regard to foreign corporations would not interfere with the deal and that he simply called attention to it for their own good. The testimony further shows, and that fact is undisputed, that Ferguson thereafter notified Hewitt that he had found the power of attorney and there was no further objection on that ground. But counsel urge that Ferguson had no right, under the terms of the contract as disclosed by the writings, to "insist on a perfect record title." We again call the attention of the court to the fact that Mr. Ferguson testified, as appears at page 125 of the Transcript, that the deed was sent to the Astoria National Bank at his request and pursuant to an agreement between the parties. Mr. Ferguson's testimony was:

"I think I requested Mr. Hewitt to send the deed to the Astoria National Bank. This request

was made when I was in Tacoma, at the time we made the bargain for the land; he said he would have it fixed up and have a meeting of the Board of Directors, and he told me the whole thing; that he and his son owned all the stock. I told him the abstracts would have to be made, and if we found the title was alright, we would pay the money and take the deed. * * * Mr. Hewitt was to send the deed over, we would have the abstract of title made and when the *title was perfect* we would pay the money and take the deed."

Now, this testimony is undisputed. Mr. Hewitt nowhere contradicting. Hence, by the escrow agreement, Mr. Ferguson was to have the right to examine the deed and the title, and if found "perfect," to pay the money and take possession of the deed.

It is worthy of note also that in all the correspondence between the parties regarding the title, no question was made touching the right of Mr. Ferguson to call for a perfect title, but on the contrary, it was recognized as his right and as a part of the agreement. The minds of the parties met fully as to the terms of the contract, and this is disclosed very satisfactorily and clearly by the correspondence.

XI.

CONCERNING THE CONTENTION OF DEFENDANT THAT THE AGENT WHO NEGOTIATED THE SALE WAS NOT AUTHORIZED THEREUNTO IN WRITING.

It is next contended in the brief of the defendant that

the sale was negotiated by Henry Hewitt, Jr., and that he was not thereunto authorized in writing. Mr. Justice Wolverton, who tried the case below, disposed of that contention in the following language:

“I am not favorably impressed with the defense as elucidated by the testimony, that the Investment Company was not authorized to execute the deed. Henry Hewitt, Jr., was in control of the entire business of the company and he and his son, J. J. Hewitt, and perhaps his wife, were the owners of practically the whole of the capital stock. J. J. Hewitt, the son, was secretary. The by-laws of the company would seem to authorize the president, with the approval of the other members of the finance committee, such committee consisting of the president and two other members of the board of directors to buy and sell real property without further specific authority from the board. By Article 7 he is made general manager ‘with full power to buy real estate, or anything which the company is entitled to hold, buy, and sell, subject to the approval of the finance committee;’ and by Article II, it is made the duty of the Finance committee ‘to advise with and approve the purchases and sales made by the president.’ Evidently, Henry Hewitt, Jr., has conducted the business of the company as though he were vested with full power to do the things requisite to the purchase and sale of real property, all in the name of the company, and his conduct in connection with the transaction now in controversy was in accord with such practice. Under

such conditions and practice, the Hewitt Investment Company ought to be and is estopped to deny the authority of Hewitt to enter into the contract or agreement in question to execute with the secretary the deed necessary to convey the title."

Henry Hewitt, Jr., the president of the corporation, had for many years managed and conducted the business of the corporation without consulting any other person. At the time the deed was executed, there were three directors, namely: Henry Hewitt, his wife and his son, J. J. Hewitt. The deed was executed in the name of the corporation, by Henry Hewitt, Jr., as president, and J. J. Hewitt, as secretary, hence, a majority of the Board of Directors signed the deed. At page 141 of the Transcript of Record, it will be seen that J. J. Hewitt, referring to the execution of the deed, said:

"I left the determination of those matters to my father and acted as he decided, as he had a majority or practically all of the stock. I do not know what become of the deed when it was returned to be corrected. I have not seen it since."

And at page 143 of the Transcript of Record, said J. J. Hewitt further testified:

"I came home after two or three months. Mr. Hewitt, my father, said there is a deed to sign; he was president of the company; I asked him what it was and he said that he had a deal on with Ferguson to trade the lands, and I signed the deed, and it was sent down there, and the next thing I knew the deed came back for correction of the title, or

something, and the matter, so far as I was concerned, was dropped. I think the other director then besides myself and my father was Rocena L. Hewitt, my mother. I think there were but three directors at that time."

At page 103 of the Transcript, Henry Hewitt, Jr., testified as follows:

Q. Who are the directors or trustees now?

A. Why I think there is just the three. We haven't had the meetings on the plan of those that were elected.

Q. What three are there?

A. It is myself and John and my wife, I think.

And at page 104, he testified that he consulted his wife. It is true that he changed his testimony so frequently, and was so contradictory and inconsistent in his statements that it is difficult to say what his testimony is on any particular point, but it is very clear from the whole that he consulted his wife and she knew about the deed being made.

It is equally clear from the testimony of J. J. Hewitt that his father and mother and himself constituted the Board of Directors.

Article VII of the By-laws of the corporation is as follows:

"The president shall preside at all meetings of the Board of Directors, sign all notes or evidence of indebtedness, deeds, mortgages and all other legal papers of the corporation. He shall be general manager of the corporation, with full power

to buy real estate, notes, bonds or other evidence of indebtedness, or anything which the company is authorized to hold, buy and *sell*, subject to the approval of the finance committee, of which he shall be chairman."

Article XI provides that the finance committee shall consist of the president and two other members of the Board of Trustees. In the evidence and generally throughout the case, the board of trustees are referred to as the board of directors. Under the statute of the State of Washington, the governing body of a corporation is known as the board of trustees, and where the word "director" is used in this brief and in the evidence, trustee is meant. It will be seen that under the by-laws, the president had power to "buy and sell," subject to the approval of the finance committee, which was to consist of himself and two other of the trustees. There were but two other members of the board of trustees, and the testimony shows that he consulted them in making the deed in question, but as stated, the evidence clearly shows that it was the practice for the president to run the corporation to suit himself; he was practically the corporation, being the owner of all the stock, excepting the few shares his wife and son owned.

Also, the testimony shows, and is undisputed, that the deed delivered at the bank was executed under the corporate seal of the corporation, and we think there is no exception to the rule that this implies that the execution was by authority of the corporation. Thus, it is stated in Devlin on Deeds, sec. 341, speaking of the effect of a corporate seal attached to a deed:

“The deed is prima facie evidence that it was affixed by proper authority.” *McCracken vs. City of San Francisco*, 16 Cal. 591.

In the absence of proof to the contrary therefore, the corporation seal being affixed, creates the presumption that the execution of the deed had the approval of the finance committee. As we have stated, however, the testimony of Hewitt shows that he did consult both his son and wife, who were the other two members of the finance committee.

As we understand the law relative to private corporations, the by-law above quoted was ample authority for the president to execute deeds, and it required no additional authority or action on the part of the board of trustees to empower him so to do.

In *PEEK VS. SKEELEY LUMBER CO.*, 59 Ore. 37 (117 Pac. 413) the Supreme Court of Oregon held that the following provision in a by-law was sufficient authority for a president to sign negotiable paper of a corporation, to wit:

“The president shall be general executive officer of the corporation * * * shall sign all stock certificates, written contracts, deeds, checks or warrants upon the treasurer, and shall perform generally all the duties usually appertaining to the office of president of a corporation. He shall have general charge, (subject to the control of the board of directors) of the business affairs of the corporation, may sign and indorse bonds, bills, checks and promissory notes on behalf of the corporation, but

shall have no power to incur any debt on behalf of the corporation, without the previous consent of the board of directors.”

Passing on the sufficiency of the authority here given, the court said on page 414:

“We think the by-law quoted is not of doubtful meaning, and disposes of the case against defendant’s contention. In the by-law quoted the words in brackets—‘subject to the control of the directors’ means that they may control his acts even in the matters expressly delegated to him, but, unless they do take some action, the acts authorized may be done by him without other authority from the board. That language is a reservation in the board of a right to control his acts but the authority is complete in the matters enumerated until the board has affirmatively directed otherwise.”

As stated in the foregoing opinion, and the same applies equally to the by-law in question, “the language is a reservation in the board of a right to control his acts, but the authority is complete in the matters enumerated until the board has affirmatively directed otherwise,” so here, the authority was complete in the president until the finance committee directed otherwise, but we do not think it necessary to appeal to this authority because we think the clear inference from the testimony was and is that the president by custom, acted without other authority than the by-laws, and it was his universal practice with the knowledge of the other members of the board, to execute deeds and bind the corporation.

There is another ground upon which the validity of the deed may well be rested, namely, the fact that Henry Hewitt, Jr., was practically the owner of the corporation. In *Baines vs. Coos Bay Navigation Co.*, 45 Ore. 307, at page 313, it is said:

“Where, however, the general manager of a corporation is practically the owner of all its capital stock, self interest must necessarily prompt him to protect the rights of his principal in approving claims against it, in which case no valid reason can well be assigned why power to issue negotiable instruments to evidence debts incurred in the legitimate prosecution of the business of the corporation should not be implied.”

XII.

AS TO DEFENDANT'S CONTENTION THAT MATERIAL LETTERS ARE OMITTED OR DO NOT APPEAR IN EVIDENCE.

The defendant makes the further contention that certain letters necessary to a full understanding of the transaction do not appear in the evidence and counsel cite Section 2104, of Wigmore on Evidence, which states that: “Where a writing offered refers to another writing, the latter should also be brought in at the same time provided the reference is such as to make it probable that the latter is requisite to a full understanding of the effect of the former.” They then refer to the letter of January 3d, written by Ferguson to Hewitt, in which Ferguson says:

“This morning I wrote to the Hewitt Investment Co. which letter you will undoubtedly receive about the same time that you receive this, and at noon today, I received your letter of the 2nd, to which I hasten to reply. I think, in order to get this matter straightened out with the greatest possible speed, it would be best for you to prepare a new deed making it just the same as the former deed excepting to state that the land is all in T. 6 N. R. 6 W., W. M. instead of T. 6 S. as it now reads. It is evident from the deed in the bank that you have a copy and can see how this mistake occurred. This deed you can send to the bank to be substituted for the one that is now in their hands.”

In the first place, it does not appear that the letter which Ferguson received was necessary to a full understanding of his letter. His letter clearly referred to the deed that was in the bank and pointed out the error it contained, and suggested what should be done to correct the error. It is inconceivable that anything contained in the letter received from Hewitt would shed any light on or give any clearer understanding of the Ferguson letter than is given by its own language. According to the authority quoted, the letter referred to is only necessary when it is requisite “to a full understanding of the effect of the former.” If, however, defendant considered at the time of the trial that the letter referred to was necessary or desirable, it should have demanded the production thereof. It did not do so. This is the first time that it has raised any question relative thereto. Furthermore, in this date and age of the world, business

men have copies of all letters they write, and no doubt the defendant had a copy of the Hewitt letter. Mr. Ferguson introduced all the letters he had, and if the defendant desired to substitute secondary evidence, or a copy of the original letter of "the 2nd" from Hewitt to Ferguson, it should have applied for that privilege at the trial.

The defendants next object to the consideration of the letter of January 25, 1906, because, they say, it refers to another letter written by Hewitt. This objection appears on page 38 of defendant's brief, and a portion of the letter of January 25th is quoted, and Ferguson is there quoted as saying:

"Your recent letter received; it has no date but it was probably written January 13th as the letter to the bank, to which they have called my attention, is dated the 13th."

Now this letter of January 25th, which counsel object to having considered was introduced by defendant, as will appear at page 84 of the Transcript of record. It is rather a novel proceeding for a party to introduce in evidence a letter and then thereafter object to its consideration, because it refers to another letter which has not been produced. We think it hardly necessary to spend much time discussing this proposition.

XIII.

DEFENDANT FURTHER CONTENDS THAT THE EVIDENCE FAILS TO SHOW A MEETING OF THE MINDS OF THE PARTIES UPON THE TERMS AND CONDITIONS OF THE CONTRACTS.

We think our previous discussion of the evidence has been sufficient to demonstrate the error of this contention, and we will not devote much more time to that phase of the case. The writings show that on July 24, 1905, Ferguson wrote to the defendant calling attention to the fact that in a personal interview with its Mr. Hewitt some time prior thereto, they had discussed the matter of the sale to Ferguson of the "4 claims that you own in 6/6." He states that the price then named was more than his parties were disposed to pay, but it had occurred to him that the defendant might be willing to trade the lands for certain other lands. This letter, directed to the defendant was answered by Henry Hewitt, Jr., the president, by endorsing the following thereon, and returning it to Ferguson:

"Yours received on my return. I hardly care to trade lands. I might sell the whole bunch at 20.00 per acre. It is heavily timbered, which average from 6 to 9 M. per claim. One claim somewhat burnt."

The testimony shows that the words and figures "from 6 to 9 M. per claim" mean from 6 millions to 9 millions of feet per claim. To this letter Ferguson replied, under date of September 25, 1905, addressing his letter to the defendant, Hewitt Investment Company, (see page 130 of Transcript), in which he stated that he had received defendant's letter proposing to sell the 4 claims at \$20.00 per acre, but was not satisfied with the price, and then stated: "I am authorized to offer you \$8000.00 for the 4 claims in 6/6."

Thereafter, it seems the parties had oral communications and conversations, and these were followed by two letters from Henry Hewitt, one to the Astoria National Bank, stating: "Please deliver the enclosed deed of lands in 6/6 West to E. Z. Ferguson, \$12,800.00 net to us in Tacoma funds. We have notified Mr. Ferguson and he will probably call for the deed at an early date."

The letter to Ferguson of the same date was as follows:

"We have today sent deeds for lands to Astoria Nat. Bk. which they will deliver to you on payment of \$12,800.00."

On January 3rd, Ferguson paid the \$12,800.00 into the bank, and on the same date, wrote the defendant, calling attention to the fact that in the deed sent to the bank, "the description reads T. 6 S. instead of T. 6 N." and stating: "I have today deposited in the Astoria National Bank the sum of \$12,800.00, the sum to be sent to you in Tacoma Exchange when the title to this land is made perfect in me. I do this so that you will understand that I am not endeavoring to gain time, but am ready and willing to take over the deal whenever it is in shape for delivery. * * * In regard to the commission of $2\frac{1}{2}\%$, as mentioned in your letter, I think it was thoroughly understood between myself and My Henry Hewitt that I was to have the 5% and I think of course that I should have it, but if the Company absolutely refuses to allow me more than $2\frac{1}{2}\%$, *I will, of course, take the lands anyway.*"

On the same date, he wrote to the President of the defendant, Henry Hewitt, saying:

"This morning I wrote to the Hewitt Investment Co. which letter you will undoubtedly receive about the same time as you receive this, and at noon today, I received your letter of the 2nd, to which I hasten to reply. I think, in order to get this matter straightened up with the greatest possible speed, it would be best for you to prepare a new deed making it just the same as the former deed, excepting to state that the land is all in T. 6 N. R. 6 W. W. M. instead of T. 6 S. as it now reads.

It is evident from the deed in the bank that you have a copy and can see how this mistake occurred. This deed you can send to the bank to be substituted for the one that is now in their hands."

Further on in the letter, Ferguson discussed the matter of the commission, reference to which is made in several letters, saying:

"In regard to the commission of $2\frac{1}{2}\%$ instead of 5% as you agreed, I hardly think that you should cut me off from this, as it was thoroughly understood between us, and I believe that after you have considered the matter fully, that you will persuade the company to allow it. *However, in any event, we want the land whether the company will allow us 5% or not.*"

On January 5, 1906, Henry Hewitt, President of the defendant, wrote Ferguson in answer to his suggestion

in the letter above quoted that they correct the deed, as follows:

"Your favor Jan. 3 received. I have written Astoria Nat. Bank to return deeds and as you suggest will make out new deeds, Mr. Griggs has the old Hattie Lockwood deeds signed by him as power of attorney and will send new deed for her to sign. It may take some little time. * * * Advise bank to return deeds."

On the same date, the Hewitt Investment Company wrote to the Astoria National Bank, saying:

"The Hewitt Investment Co. or Henry Hewitt, sent you some time ago deeds to deliver to E. Z. Ferguson on payment of \$12,800.00, I think. The deeds it seems are faulty & Mr. Ferguson wants them changed. You will please return them and oblige."

On January 8, 1906, Ferguson wrote to Hewitt saying:

"Replying to your favor of the 5th, I have to say that the bank has informed me that they would return the deeds to you by tonight's mail. I suppose it will take two or three weeks for you to get them straightened out. In any event, the money will be left at the bank for you as soon as the title is completed."

On January 9, 1906, the Astoria National Bank wrote to the Hewitt Investment Company, saying:

"Replying to yours of Dec. 22, 1905, we hereby return for correction the deed mentioned therein

at the request of Mr. E. Z. Ferguson, grantee named in said deed. We beg to state that on the 3rd inst. Mr. Ferguson deposited in this bank the sum of \$12,800.00, to be paid to you in Tacoma Exchange, and the title to the property purporting to be conveyed in said deed to be perfect in him, and we hold the same subject to the above conditions."

The record shows that plaintiffs called on the defendant to produce the deed, which was returned to it by the bank, but Henry Hewitt, the president, and J. J. Hewitt, the secretary of the defendant corporation, both testified that it had been destroyed or lost; that they could not find it. That it has been either destroyed or lost we seriously doubt, but nevertheless the defendant refused to produce it. In this connection, it is interesting to observe that Mr. Ferguson testified that from an inspection of the deed, which was sent to the bank, both he and his attorney remarked at the time that a press copy thereof had been taken, and in the letter of Mr. Ferguson, of January 3rd, to Henry Hewitt, at page 66 of the Transcript, he refers to the deed, saying: "It is evident from the deed in the bank that you have a copy and can see how this mistake occurred," but the copy was never produced, nor was the fact that they had a copy ever denied, either in the correspondence, or otherwise. Mr. Ferguson, however, testified regarding the contents of the deed. He stated, in substance, its language and the description of the property, the same being as described in the complaint herein, excepting that the land was described as being in Township 6

south instead of Township 6 north. He testified that it was a regular warranty deed and was duly acknowledged, and was executed under the corporate seal of the corporation, was signed in the name of the corporation by the president and secretary.

We have then here a correspondence, which in connection with the deed, gives a true and correct description of the land to be sold, gives the purchase price to be paid, the parties, grantor and grantee, and in fact, all of the terms of the contract certainly sufficient to constitute the memorandum required by the statute. It may be said that the description in the deed was faulty. In one respect that is true, but the letters point out wherein the description was faulty and what was necessary to make the description correct. Whatever may be said of any case holding that a deed deposited in escrow, or in the hands of a third party may not be considered for the purpose of aiding the writings or supplying the description, the doctrine thereof cannot apply in this case because here the correspondence so distinctly refers to the deed that it makes it a part thereof. We submit, therefore, that a sufficient memorandum of the contract is in writing and that it clearly appears therefrom that the defendant agreed to sell and the plaintiff agreed to purchase the premises in question for the sum of \$12,800.00.

In what respect then did the minds of the parties fail to meet? The written evidence shows that the agreement was that the defendant would sell and the plaintiff would purchase the premises for \$12,800.00; it shows,

as well, a true description of the premises to be sold. It is contended by counsel for defendant, however, that a condition of the sale was that Ferguson should secure for the defendant certain other lands. That phase of the case we have considered under another heading, and we think that we have demonstrated that there was no such condition. The talk about that was entirely aside from the contract of sale.

It is also contended that the minds of the parties did not meet in this, that Ferguson contended in his letter to the bank that the title in him was to be made perfect. That, as we have shown, was a condition of the escrow. Ferguson testifies positively and directly that it was agreed that the deed should be sent to the bank, and after being examined by him, and the title inspected, if found to be perfect, he was to pay the money and take the deed, and he was to have the necessary time to make the examination. The correspondence shows, as we have hereinbefore pointed out, that the defendant did not question at any time but what it was to give a perfect title, and made no objections to the suggestions on the part of Ferguson looking to making the title perfect.

Also, at page 44, and elsewhere in their brief, they assert that Ferguson demanded not only a perfect, but "a merchantable title." There is no such testimony that we can recall, or that we have been able to discover. Ferguson did write to the bank that the money was to be paid to the defendant as soon as the title was perfect in him, and that, as we have shown, was a part of the escrow agreement proven by uncontradictory testimony.

XIV.

AS TO DEFENDANT'S CONTENTION
THAT THE DEED WAS NOT DEPOSITED
IN THE BANK AS AN ESCROW.

We have already attempted to show that the deposit of the deed in the bank was a deposit in escrow. We wish briefly, however, to refer to some of the authorities cited by defendant in support of its contention that the deposit was not made as an escrow.

The first case cited is that of Van Valkenburg vs. Allen, 126 N. W. 1092. It is there stated that the case did not involve an escrow in the technical sense because "there was no delivery to a custodian *in pursuance of an agreement of the parties*. * * * The bank was not a party to the agreement and was in no wise agreed upon by the parties as a custodian. It was merely Allen's agent. Its possession was Allen's possession. The deed it received was under Allen's control and dominion."

Now, the facts in the case at bar present an entirely different situation. Here, the deed was sent to the Astora bank pursuant to an agreement between the parties. That is testified to positively, as we have shown, by Ferguson, and his testimony in that respect is not disputed by any witness and, as we have pointed out, is corroborated by the written correspondence. The bank was not in this case the defendant's agent. It will be remembered that we have heretofore pointed out that in the letter of Hewitt to Ferguson stating that he had written to the bank in compliance with Ferguson's request to have the bank return the deed in order that it

might be corrected and asked Ferguson to advise the bank to return the deed. Ferguson then wrote to the defendant that he had advised the bank to return the deed. The defendant wrote to the bank and requested it to return the deed. The bank then wrote to the defendant, that complying with its request and at the request of Mr. Ferguson, it forwarded to it the deed for correction. This all shows quite clearly, we think, that the bank was not the agent of the defendant, but that it held the deed in escrow, pursuant to the agreement of the parties.

The case of **DAVIS VS. BRIGHAM**, 56 Ore. 41, is also cited by defendant, but we respectfully submit it does not support its contention. In that case, one Mitchell was endeavoring to get together a large body of land and sell it to one, Davis. Brigham owned one claim in the neighborhood of the lands Mitchell was seeking to syndicate, and Mitchell wrote to Brigham urging him to put his land in for \$1600.00. Brigham answered that he considered \$1600.00 too small a price, but that if his land was needed in order to develop the country, he would let it go at that price, and he sent a deed to the bank, with a draft attached, the deed being made out to Davis, the man to whom Mitchell was seeking to sell the lands. Davis declined to honor the draft and Brigham therefore instructed the bank to return the deed. There had been no negotiations whatever between Davis and Brigham. It was solely on the ground that there had been no agreement between them for the sale and purchase of the land and no acceptance of the offer of Brigham by Davis that the court held specific perform-

ance could not be enforced. The deed was not sent to the bank through any agreement, or pursuant to any arrangement between the parties, and no money was paid into the bank by either Davis or Mitchell, but on the contrary, Davis declined to honor the draft. The court quite properly said, as quoted in defendant's brief, "It (the deed) was not a deposit upon a contract with him (Davis) that it should be deposited, nor had he a right to demand that it remain in escrow for his benefit or for any period of time." Quite true. There had been no agreement that the deed should be sent to the bank or deposited with the bank, and indeed, there had been no agreement whatever with Davis. The man, Mitchell, who was collecting the lands, or trying to secure a body of land in order that he might sell it to Davis, had the correspondence, such as there was, with Brigham. Here, there was an agreement that the deed should be sent to the bank and both parties recognized that it took the assent of each of them to have it withdrawn from the bank even for correction.

We have shown that here there were sufficient parties, and that they entered into a contract, and hence, the plaintiff's case comes clearly and fully within the rule announced by the court. Counsel quote from Devlin on Deeds to the effect that; "Where the grantor retains the right of control over the deed, it is not an escrow, notwithstanding it may have been deposited with a third person with instructions to deliver it to the grantee upon the compliance with said specified conditions."

But, how does that apply to this case? Here, as we

have seen, the grantor did not retain the right of control and recognized that it did not contain the right of control, because after the parties had agreed that the deed should be withdrawn for correction, the defendant wrote both the bank and Ferguson to have the deed returned; wrote to the bank to return it and requested Mr. Ferguson to advise the bank so to do; recognized the right of Ferguson to have the deed retained, and recognized the fact that it was not within the control of the defendant. We think it is not necessary to further discuss the authorities cited by defendant on this proposition.

XV.

THE PAYMENT AND TENDER OF THE MONEY.

It is contended by the defendant at page 53 of its brief that Ferguson did not make an unconditional tender of the \$12,800.00. In support of their contention they state that he deposited the money in the bank to be paid to the defendant when the title should be made perfect in him, Ferguson. We have several times pointed out that the testimony is undisputed that such was the condition of the escrow, but at page 54 of their brief, counsel state that Ferguson testified, "I considered the money was there subject to my order and I had a right to withdraw it without obtaining any consent of Mr. Hewitt." We submit that this is a very unfair statement of the testimony, for reference to the record will show that Mr. Ferguson was testifying about the withdrawal of the money from the bank at the time this

suit was commenced in order to pay it into court. Of course, the testimony as shown in the record, is a condensed statement, and does not as fully disclose the testimony as it was given at the trial, but even from this condensed statement, the fact, as we have stated it, quite clearly appears. Mr. Ferguson testified on direct examination that the money remained in the bank as a tender. This was never withdrawn until this suit was commenced. He was then asked on re-cross examination whether he obtained the consent of defendant to withdraw the money from the bank. He answered, "At the time I withdrew the money from the bank, I did not ask or obtain any consent of Mr. Hewitt to such withdrawal. I considered the money was there subject to my order, and I had a right to withdraw it without obtaining any consent from Mr. Hewitt. That was after he had refused to send the deed back and when I had to bring suit to get the deed." And quite clearly he was right.

The record shows that as late as April 30, 1906, the Astoria Bank wrote to the Hewitt Investment Co. calling its attention to the fact that the \$12,800.00 was still on deposit with it, and concluded by saying: "Will you kindly let us know whether or not there is any probability of the trade being closed and kindly state whether or not you desire us to hold the money any longer." There was no answer to that letter. This letter of the Astoria Bank was introduced by the defendant (see page 83, transcript), and yet counsel seek to make it appear that Ferguson's testimony was that the money was on deposit subject to his order. Of course, he gave no such

testimony and the testimony he gave is not subject to any such construction.

XVI.

AS TO DEFENDANT'S CONTENTION THAT TO DECREE SPECIFIC PERFORM- ANCE WOULD BE INEQUITABLE.

Defendant seeks to make it appear that it would be inequitable to decree specific performance because it appears from the evidence that the land has advanced greatly in value. That contention is based on the testimony of Mr. Ferguson, who at the trial testified that at the time the land was purchased, the price to be paid was a higher price than any land in that locality had sold for theretofore. His testimony appears on page 124 of the transcript. He states that nearly all the land which they had purchased in that vicinity had been purchased for less than \$12.50 per acre, and some as low as \$1000.00 per claim, within a few months preceding the time of entering into the contract with the defendant. He further testified as follows:

"I know timber through the Nehalem valley was rated along those lines at that time, but it raised after that quite rapidly and was raising all the time in 1906 and 1907. Timber went up very rapid during 1906. I bought and sold a great deal of timber in that vicinity. * * * Timber went up very rapidly after this deal was made, but at the time we purchased this land, \$20 an acre was an extra high price for it."

Doubtless the fact that subsequent to the contract,

the price of such lands advanced explains why the defendant repudiated its contract, but does it offer any reason why this court should not enforce the contract, if it finds it was made as plaintiffs contend? At the time this contract was made, a good round price was paid, according to the then value of the land. If the land had decreased in value and the defendant had returned the deed and demanded its money, would it not have been entitled to recover? Would the fact that the land had decreased in value be a defense for the plaintiffs in the action against them to recover the purchase price?

Counsel state that nearly a year expired after the defendant refused to deliver the deed before suit was brought to compel the performance, and that in the meantime, the land increased in value, but it should be kept in mind that *during all that time the \$12,800.00 remained on deposit and was tendered to the defendant*, and we are at a loss to understand how any injustice would be done the defendant at this time by requiring it to conform to and comply with its contract.

This case was heard and tried in the court below by Judge Wolverton, who heard the witnesses testify, saw their demeanor on the witness stand, and who carefully inquired into all of the facts. His decision appears at page 21 of the transcript, and we have no doubt it will be carefully read by each member of this court. We really need not have discussed the case further than to submit the opinion of Judge Wolverton, because it is a fair and clear statement of the facts and the law. We respectfully submit that the decree of the Lower Court should be affirmed.

FULTON & BOWERMAN,

Attorneys for Appellants.

